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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928 29

No. ~~676~~ 32

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, SUED IN THE NAME OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, AND CONSOLIDATED NAVIGATION COMPANY, INC., PETITIONERS

vs.

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN AD LITEM, JOHN A. LYDECKER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 4, 1929
CERTIORARI GRANTED MARCH 5, 1929

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928

No. 676

UNITED STATES SHIPPING BOARD MERCHANT FLEET CORPORATION, SUED IN THE NAME OF THE UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, AND CONSOLIDATED NAVIGATION COMPANY, INC., PETITIONERS

vs.

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN AD LITEM, JOHN A. LYDECKER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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1 In United States District Court, Southern District of New York

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN AD LITEM, John A. Lydecker, plaintiff

AGAINST

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION and Consolidated Navigation Company, Inc., defendants

Writ of Error

UNITED STATES OF AMERICA, *ss.:*

The President of the United States to the honorable judges of the United States District Court for the Southern District of New York, Greetings:

Because in the proceedings, as also in the rendition of the judgment of a plea which is in the said United States District Court for the Southern District of New York before you, or some of you, between Benjamin Lustgarten, an infant, by his guardian ad litem, John A. Lydecker, plaintiff, and the United States Shipping Board Emergency Fleet Corporation and Consolidated Navigation Company, Inc., defendants, a manifest error hath happened to the great damage of the said United States Shipping Board Emergency Fleet Corporation and the Consolidated Navigation Company, Inc., as by their answers appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties afore-
2 said in its behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid with all things concerning the same to the United States Court of Appeals for the Second Circuit, together with this writ, so that you may have the same in the said United States Circuit Court of Appeals for the Second Circuit at New York, within thirty (30) days from the date hereof, with the records and proceedings aforesaid being inspected the said United States Circuit Court of Appeals for the Second Circuit may cause further to be done therein to correct the error, what of right, and according to the laws and customs of the United States shall be done.

Witness, the Honorable William Howard Taft, Chief Justice of the United States, the 5th day of October, in the year of our Lord, one thousand nine hundred and twenty-seven.

[SEAL.] ALEX. GILCHRIST, Jr.,
Clerk of the United States District Court for the Southern District of New York.

Allowed October 5th, 1927.

T. D. THACHER,
Judge of the United States District Court for the Southern District of New York.

3 [Summons in usual form omitted in printing.]

4 In United States District Court

Complaint

[Title omitted.]

Plaintiff, complaining of the defendants, respectfully alleges:

First. Upon information and belief that the defendant, United States Shipping Board Emergency Fleet Corporation, is a foreign corporation, organized and existing under and by virtue of the laws of the District of Columbia, having an office and place of business in the borough of Manhattan, city and State of New York.

Second. Upon information and belief that the defendant, Consolidated Navigation Co., Inc., is a domestic corporation, having an office and place of business in the borough of Manhattan, city and State of New York.

Third. Upon information and belief that the defendant, United States Shipping Board Emergency Fleet Corporation, at and during all the times hereinafter mentioned owned, managed and controlled a certain vessel known as the "Coelleda."

5 Fourth. Upon information and belief, that the defendant, Consolidated Navigation Co., Inc., at and during all the times hereinafter mentioned, operated, managed, and controlled a certain vessel known as the "Coelleda."

Fifth. That the plaintiff signed regular shipping articles abroad the said steamship as able-bodied seaman for a voyage to England and return to the United States at $62.50 per month and found.

Sixth. That on or about the 6th day of March, 1926, about a day and a half off Swansea, Wales, while the vessel was proceeding towards the United States, plaintiff was ordered to take some ashes and dump it overboard; and while so doing, and while at the rail of the vessel the seas suddenly came abroad due to the rolling of the ship, striking him in the back and driving his chest with great force against the rail of the vessel, whereby he was caused to sustain serious, severe, and, upon information and belief, permanent injuries.

Seventh. That plaintiff thereby became sick, sore, lamed, and disabled; has been and will be confined to his home and bed; has suffered and still suffers great pain and agony; has been and will be prevented from working; has lost and will have to lose large sums of money which he otherwise would have earned; has paid out and will have to pay out large sums of money for medical and surgical attendance and treatment, for medicines and for his maintenance and cure, all to his damage in the sum of $15,000.00.

6 Eighth. That said injuries were due to the negligence of this defendant, its agents, officers, and employees, in failing to provide the plaintiff with a safe and proper place in which to work; by reason of the negligence of the employees and agents of the de-

fendant in compelling the plaintiff to perform unnecessary work at a time when the seas were constantly coming over the vessel and in placing him in a dangerous and unsafe position; by reason of the condition of the vessel that the aft tanks were leaking and were full of water; that the ship was hard to manage and to steer; that the pump lines to pump the said water were clogged, were out of use and defective; that the vessel was not equipped with ash chute or appliances for the dumping overboard of ashes and other materials; that it was not equipped with small ash buckets for the use of the plaintiff in dumping said ashes into the chute and overboard; that he was compelled to and did use a large ash can which was too heavy and without adequate assistance was compelled to discharge the said ashes in a large can over the side instead of into the chute, and that thereby the vessel was rendered unseaworthy.

For a second cause of action plaintiff realleges and reiterates all the facts hereinafore set forth and in addition thereto alleges:

Ninth. That at the time of the said accident plaintiff was severely and seriously injured; that he was in need of medical treatment and rest; that the said condition was known to the officers and the master of the said vessel and that although plaintiff demanded that he be furnished medical treatment and be laid up and freed from
7 work the same was refused him and he was compelled to and did work; that he sustained hemorrhages from the mouth and the lungs which were known to the master and that he asked to be relieved from duty and be put ashore in a hospital; that such request was refused him; and that because of said allegations mentioned in this paragraph plaintiff's injuries were aggrevated all to his damage in the sum of $15,000.00.

Tenth. That under the general maritime law plaintiff is entitled to his maintenance and cure and wages to the end of the voyage, separate and district from indemnity.

Wherefore plaintiff demands judgment against the defendant in the sum of $30,000, with costs, plus a sum to provide his maintenance and cure.

SILAS B. AXTELL,
Attorney for Plaintiff,
Office & P. O. Address, 11 Moore Street, New York, New York.

8 [*Duly sworn to by Benjamin Lustgarten; jurat omitted in printing.*]

9 In United States District Court

Answer of U. S. Shipping Board Emergency Fleet Corp'n.

The defendant, United States Shipping Board Emergency Fleet Corporation, by Emory R. Buckner, United States attorney, Irving L. Evans, of counsel, answers the complaint herein, and says upon information and belief:

(A) Answering the first alleged cause of action

First. Denies the allegations contained in paragraph "second" of the complaint herein, except that it admits that the Consolidated Navigation Co., Inc., has an office and place of business in the borough of Manhattan, city and county of New York.

Second. Denies the allegations contained in paragraphs "third," "sixth," "seventh," and "eighth" of the complaint herein.

Third. Denies the allegations contained in paragraph "fourth" of the complaint herein, except that it admits that the defendant, Consolidated Navigation Co., Inc., managed and operated the
10 steamship "Coelleda" at the times mentioned in the complaint under and pursuant to an agreement, a copy of which is annexed hereto and made a part of this answer.

(B) Answering the second alleged cause of action

Fourth. Denies the allegations contained in paragraphs "ninth" and "tenth" of the complaint herein.

For a first and complete defense to the first and second causes of action the defendant, upon information and belief, alleges:

Fifth. That on or about the 20th day of January, 1926, the steamship "Coelleda" was and now is a merchant vessel belonging to the United States of America and duly documented and registered in the name of the United States of America, and that this action is in effect a suit against the United States of America, and whatever rights, if any, the plaintiff may have by reason of the facts alleged in the complaint herein arose out of, and are founded exclusively upon the Constitution and laws of the United States of America, and particularly the act of Congress approved March 9, 1920, authorizing suits against the United States of America, in Admiralty, which act the defendant, United States Shipping Board Emergency Fleet Corporation, pleads in bar of the plaintiff's recovery in this action.

For a second and complete defense to the first and second causes of action this defendant, upon information and belief, alleges:

Sixth. That the plaintiff's employment had certain risks
11 incident thereto which were obvious and well known to the plaintiff at all the times of his employment, and also when plaintiff first entered thereon, and that said risks were assumed by plaintiff and that whatever injuries plaintiff received in said employment and which are complained of by him arose from and were caused by said risks, all of which were taken and assumed by plaintiff at the time he entered upon said employment, and during the continuance thereof.

For a third and complete defense to the first and second cause of action the defendant, upon information and belief, alleges:

Seventh. That any injuries sustained or suffered by plaintiff at the time and place or on the occasion mentioned in the complaint

were caused in whole or in part or were contributed to by the negligence and want of care of plaintiff and not by any negligence or fault or want of care on the part of the defendant.

Wherefore, defendant, United States Shipping Board Emergency Fleet Corporation, demands judgment dismissing the complaint herein with costs.

EMORY R. BUCKNER,
U. S. Attorney,
IRVING L. EVANS,
Of Counsel,
Attorney for Defendant.

United States Shipping Board Emergency Fleet Corporation.
Office & P. O. Address, 45 Broadway, borough of Manhattan, New York City.

12 To: SILAS B. AXTELL,
Attorney for Plaintiff.
Office & P. O. Address, 11 Moore Street, Borough of Manhattan, New York City.

13 [*Duly sworn to by Fergus P. Mullins; jurat omitted in printing.*]

14 In United States District Court

[Title omitted.]

Answer of Consolidated Navigation Co., Inc.

The defendant, Consolidated Navigation Co., Inc., by Irving L. Evans, its attorney, answers the complaint herein, and says upon information and belief:

(A) Answering the first alleged cause of action

First. Denies the allegations contained in paragraph "second" of the complaint herein except that it admits that it has an office and place of business in the city and county of New York.

Second. Denies the allegations contained in paragraphs "third," "sixth," "seventh," and "eighth" of the complaint herein.

Third. Denies the allegations contained in paragraph "fourth" of the complaint herein, except that it admits that it operated the steamship "Coelleda" at the times mentioned in the complaint as agent.

15 (B) Answering the second alleged cause of action

Fourth. Denies the allegations contained in paragraphs "ninth" and "tenth" of the complaint herein.

For a first and complete defense to the first and second causes of action this defendant, upon information and belief alleges:

Fifth. That on or about the 20th day of January, 1926, the steamship "Coelleda" was and now is a merchant vessel belonging to the United States of America and duly documented and registered in the name of the United States of America, and whatever rights, if any, the plaintiff may have by reason of the facts alleged in the complaint herein arose out of, and are founded exclusively upon the Constitution and laws of the United States of America, and particularly the act of Congress approved March 9, 1920, authorizing suits against the United States of America, in Admiralty, which act the defendant, United States Shipping Board Emergency Fleet Corporation, pleads in bar of the plaintiff's recovery in this action.

For a second and complete defense to the first and second causes of action this defendant, upon information and belief alleges:

Sixth. It repeats and realleges the allegations contained in paragraph "fifth" of this answer and further alleges that the said steamship "Coelleda" at the time of the plaintiff's alleged damage and injury was being operated by this defendant as agent, under and pursuant to an agreement entered into by and between it and
16 the United States of America on the 1st day of May, 1924. At all the times mentioned in the complaint, the United States of America, as owner, was operating the said steamship for its own account, and this defendant did not man, equip or supply said steamship for its own account or by its own procurement. That the said steamship was owned by the United States of America and that the defendant was merely an agent of the United States of America and that the United States of America was operating said ship by and through this defendant as agent, was known to the plaintiff at the time that plaintiff signed shipping articles aboard the said steamship as set forth in the "fifth" paragraph of the complaint. Therefore, this defendant is not liable for any damage sustained by the plaintiff not due to the negligence of this defendant.

For a third and complete defense to the first and second causes of action this defendant, upon information and belief alleges:

Seventh. That the plaintiff's employment had certain risks incident thereto which were obvious and well known to the plaintiff at all the times of his employment, and also when plaintiff first entered thereon, and that said risks were assumed by plaintiff and that whatever injuries plaintiff received in said employment and which are complained of by him arose from and were caused by said risks, all of which were taken and assumed by plaintiff at the time he entered upon said employment, and during the continuance thereof.

17 For a fourth and complete defense to the first and second causes of action this defendant, upon information and belief, alleges:

Eighth. That any injuries sustained or suffered by plaintiff at the time and place or on the occasion mentioned in the complaint were caused in whole or in part or were contributed to by the negligence and want of care of plaintiff and not by any negligence or fault or want of care on the part of the defendant.

Wherefore defendant, Consolidated Navigation Co., Inc., demands judgment dismissing the complaint herein with costs.

IRVING L. EVANS,
Attorney for Defendant,
Consolidated Navigation Co., Inc.

Office & Post Office Address, 45 Broadway, borough of Manhattan, city of New York.

18 [*Duly sworn to by John H. McIntyre; jurat omitted in printing.*]

19 In United States District Court

[Title omitted.]

Demand for bill of particulars

SIR: Please take notice that the defendants hereby demand that plaintiff serve upon the attorney for the defendant, United States Shipping Board Emergency Fleet Corporation, within four days after the service of this notice a verified bill of particulars stating the following details, or in lieu thereof a statement under oath that plaintiff has no knowledge or information concerning them:

1. The date, month, day, and year of plaintiff's birth?
2. Who ordered plaintiff to do the specific work he was engaged in at the time of the accident as alleged in the sixth paragraph of the complaint?
3. On what date and at what time of day did plaintiff sustain injuries as alleged in the sixth paragraph of the complaint?

20 4. How many days after the SS. "Coelleda" had left Swansea, Wales, did the plaintiff sustain the alleged injuries?

5. On what deck of the vessel was plaintiff injured as alleged in the sixth paragraph of the complaint?
6. Was plaintiff on the port side or on the starboard side of the vessel when he sustained the alleged injuries?
7. State whether or not plaintiff was on the extreme after end of the said deck of the vessel at the time that he sustained the alleged injuries, and if he was not, then state in detail where, with relation to and after end of the said deck plaintiff was when he was allegedly injured.
8. Was plaintiff thrown to the deck of the vessel as a consequence of his having been struck by a wave as alleged in the sixth paragraph of the complaint?
9. Describe in detail the rail of the vessel against which plaintiff was thrown as alleged in the sixth paragraph of the complaint—whether it was a chain rail or pipe rail and high it extended above the deck; and further describe its position with relation to the side

of the vessel—whether it ran forward and aft or athwartship or diagonally.

10. Was plaintiff knocked unconscious as a consequence of his being thrown against the rail as alleged, and if so, how many hours did he remain unconscious?

21 11. If plaintiff became unconscious at the time of the alleged injury but not as a consequence of his being thrown against the rail of the vessel, state what caused plaintiff to become unconscious and the number of hours he remained unconscious.

12. Did any of the officers of the SS. "Coelleda" witness the alleged accident, and if so, what officers?

13. If the plaintiff became unconscious at the time of the alleged accident, which of the officers of the SS. "Coelleda" first saw plaintiff after he gained consciousness and where was plaintiff at that time?

14. Describe in detail the size, the contents, and the weight of the container plaintiff was dumping at the time of the alleged accident.

15. Is it alleged that no small buckets were on board the vessel available to the plaintiff at the time, for the work he was engaged in at the time of the alleged accident?

16. How the failure of the vessel to be equipped with ash chutes caused the alleged accident as alleged in the eighth paragraph of the complaint.

17. What appliances are meant where it is alleged in the eighth paragraph of the complaint "that the vessel was not equipped with ash chute or appliances for the dumping overboard of ashes and other materials"?

18. In what respects was the place in which the plaintiff was working an unsafe and improper place as alleged in the eighth paragraph of the complaint?

22 19. How did the alleged leak, the alleged clogged pipe lines, and the difficulty of steering the ship cause the alleged accident, as alleged in the eighth paragraph of the complaint?

20. On what date and at what time of day is it alleged plaintiff returned to work after the alleged accident?

21. How many days after the alleged accident did plaintiff return to work as alleged in the ninth paragraph of the complaint?

22. Who ordered plaintiff to return to work as alleged in the ninth paragraph of the complaint?

23. Is it alleged that plaintiff worked as second cook after the alleged accident, and, in any event, of what did plaintiff's duties consist at that time?

24. When was plaintiff's request to be put ashore in a hospital refused him as alleged in the ninth paragraph of the complaint and by whom?

25. Did plaintiff receive any medical treatment at any time after the alleged accident and if it is alleged that he did receive medical

treatment then state the name of the persons and/or officers who attended plaintiff and further state of what the treatment consisted?

26. Is plaintiff's eyesight injured as a consequence of the alleged accident and if so then state in detail the facts which caused the alleged injury to plaintiff's eyes?

23 27. Is it alleged that plaintiff is tubercular as a consequence of the alleged injury and if it is so alleged then state in detail the facts which caused plaintiff's tubercular condition?

28. State the names and addresses of all of the doctors who have treated plaintiff since the date of the alleged accident and further state the dates on which or between which plaintiff received treatment or was examined by each of them.

29. State the names and locations of all the hospitals in which plaintiff has been treated since the date of the alleged accident, and further state the dates he entered and was discharged from each of them, either as an in or out patient.

30. State the nature, location, and extent of each and every injury set forth in the complaint which plaintiff claims resulted from the alleged accident.

31. Which of said injuries does plaintiff claim to be permanent?

32. An itemized statement of the sums of money necessarily expended by the plaintiff or for which the plaintiff necessarily became liable for medicines, medical attendance, or for maintenance and cure in endeavoring to be cured of the alleged injuries.

33. An itemized statement of any other moneys plaintiff has lost or expended as a consequence of the alleged accident.

24 34. An itemized statement as to how plaintiff arrived at the sum of $50,000 as the amount of damages.

Dated New York, March 9, 1927.

Yours, etc.,

EMORY R. BUCKNER,
U. S. Attorney.

EDGAR G. WANDLESS,
Attorneys for Defendant.

Office and P. O. Address, 45 Broadway, Borough of Manhattan, New York City.

To: SILAS B. AXTELL,
Attorney for Plaintiff.

Office and P. O. Address, 11 Moore Street, Borough of Manhattan, New York City.

25 In United States District Court

[Title omitted.]

Bill of particulars

Plaintiff, for his bill of particulars, upon information and belief, respectfully alleges:

1. 15th day of November, 1907.
2. Chief cook.
3. On or about the 5th or 6th days of March, 1926, at approximately 6.35 p. m.
4. About two and a half days.
5. Midship deck.
6. Port side.
7. Yes; he was standing on the midship deck.
8. Struck by sea and bucket and crashed him to a part of the ship.
9. A pipe rail, about 4½ feet high forward and aft to defendant's vessel.
10 & 11. Ash can struck plaintiff knocking him unconscious and defendant knows how long he remained so.
26 12. Plaintiff thinks not.
13. Second mate and plaintiff was in the ship's hospital.
14. Three feet high containing ashes and garbage and weighing approximately 250 pounds.
15. It is.
16 & 17. Need not be answered; argumentative.
18. In every respect as alleged in paragraph eight in complaint.
19. Need not be answered; argumentative.
20 & 21. About two days after the accident around noon time, but the plaintiff was too sick to work, and was taken back to the hospital and remained there another two days.
22. Captain.
23. Worked in galley as second cook.
24. By the captain, on getting to Azores.
25. No, except after American consul took him off the Coelleda at Azores.
26. Yes.
27. Yes; neglect of treatment and injury to ribs and lungs.
28 & 29. Need not be answered, as that is evidence.
30 & 31. Defendant has the information in the various reports and affidavits that were served on them in our moving papers for a preference.
32. Over $2,000.
33. $1,500.
27 34. Need not be answered at this time.

Dated, New York, April 1st, 1927.

SILAS BLAKE AXTELL,
Attorney for Plaintiff.

11 Moore Street, Borough of Manhattan, New York City.

To: EMORY R. BUCKNER,
U. S. Attorney,
EDGAR G. WANDLESS,
Of Counsel,
Attorneys for Defendants.

45 Broadway, New York City, N. Y.

[*Duly sworn to by Benjamin Lustgarten; jurat omitted in printing.*]

28 In United States District Court

[Title omitted.]

Supplemental bill of particulars

Further answering the demand for a bill of particulars, pursuant to an agreement made between counsel this day, plaintiff alleges upon information and belief:

25. That plaintiff was at the rail of the vessel on the midship deck at a point which he believes was the after end of the said deck and at a point where the ashes were customarily dumped on the said vessel. When he was struck by the sea, there was no ash chute provided on the ship at that place at that time. He was struck by the sea and knocked unconscious and believes that he was washed to some other part of the ship and may have sustained other injuries to his body at other places.

26. Plaintiff's eyesight was injured in consequence of the accident; that the injury to his eyesight came from a blow on the forehead as he is informed and believes that said blow caused him to become unconscious for a period of time, and he is informed and be-
29 lieves that there is some permanent injury to his brain, nervous system, etc., and that his eyesight as a result thereof has become seriously and permanently impaired.

31. Plaintiff claims that he has received serious and permanent injuries to his eyesight, brain, nervous system, ribs, lungs, and in and about the torso, and undernourishment by being compelled to work after the accident when he was unfit; brutal treatment generally, on board the ship by the master, who was a person unfit to be a master of a ship where the crew is composed of white men. He has contracted a disease known as tuberculosis. That said condition of tuberculosis which is incipient and which plaintiff is informed and believes is a permanent condition, but hopes not. Plaintiff received an injury to his forehead where he still has a scar and which seems to be permanent. He injured the bones of his skull, has scars upon his shoulder and neck on the right side, which he believes were caused by burns from hot coals which were in the ash can when the sea struck him. Two or three of his teeth were also broken in the

upper jaw. The little finger on the left hand was broken. Plaintiff was bruised and pinched about the neck by the master, while he was lying sick in his bunk on one occasion, thus sustained the injuries, although those injuries were not itself permanent, but that said brutal treatment has resulted in aggravating the condition of his lungs, which were injured by the blow of the sea and ash can, etc.

32. For board and lodging there has already been paid, or which the plaintiff has contracted to pay or still owes, $25.00 a week from March, 1926, to date, with the exception of about one month
30 while he was in the United States Marine Hospital, approximate sum of $1,100.00; to Dr. Rubin of Philadelphia $35.00; to Dr. Chester of Atlantic City $30.00; to Dr. Buden of Philadelphia $40.00; to Drs. McPhee, Alger, Power, fees to date approximately $100.00 not paid. There is owing to Mr. Helfin, a druggist of Philadelphia, approximately $50.00. Plaintiff has paid for drugs and various medicines on prescriptions, etc., $23.00. Also railroad fare from and to Philadelphia, Atlantic City, Providence, New York, care and attention in getting about, necessary to his care and treatment, approximately $50.00. Plaintiff estimates that he will be an invalid and have an expense of not less than $50.00 per week for several years to come, if he is to be restored to good health, but he is informed and believes that he will not be restored to the condition he was in before the accident.

33. That plaintiff has lost by reason of the injury the value of his services since the end of the voyage. He states that his earning capacity at the time of the accident was fully if not more than that indicated by the articles of the ship. His wages at the time of the accident were $80.00 per month, plus his board and lodging, which is reasonably worth $75.00 per month, his total earnings amounted to about $155.00 a month, or $1,800 per annum; therefore he has lost for being entirely incapacitated the sum of $1,800 in wages.

Defendant will please take further notice that inasmuch as the plaintiff has served a notice under date of February 26, 1927, that upon the trial of this action he will move to increase the amount of damages from $30,000 to $50,000, he will ask the Court to
31 add $10,000 to each cause of action, making the total amount of each cause of action $25,000.00.

Dated New York, April 8th, 1927.

SILAS B. AXTELL,
Attorney for Plaintiff.

Office & P. O. Address, 11 Moore Street, New York, N. Y.

To CHARLES H. TUTTLE,
U. S. Attorney,
EDGAR G. WANDLESS,
Of Counsel,
Attorneys for Defendant.
Office & P. O. Address, 45 Broadway, New York, N. Y.

32 [*Duly sworn to by Silas B. Axtell; jurat omitted in printing.*]

33 IN UNITED STATES DISTRICT COURT

[Title omitted.]

Judgment

The issues in the above entitled cause having been duly brought on for trial before the Honorable Thomas D. Thacher, district judge, and a jury, on the 15th, 16th, and 17th days of June, 1927, at a trial term of this court held at the United States Courthouse in the Old Post Office Building, borough of Manhattan, city and State of New York, the defendants having appeared by counsel, the first cause of action in the complaint having been dismissed by the court on the 16th day of June, 1927, the issues in the second cause of action having been duly submitted to the jury on the 17th day of June, 1927, and the jury having duly rendered a verdict in favor of the plaintiff and against the defendants in the sum of ten thousand ($10,000.00) dollars and costs, and counsel for defendants having made a motion for a new trial and to set aside the verdict, and the court after due deliberation having denied said motions, and the costs of plaintiff, having been duly taxed in the sum of $226.50,

34 Now, on motion of Silas B. Axtell, attorney for plaintiff, it is hereby

ORDERED, adjudged, and decreed that the plaintiff, Benjamin Lustgarten, an infant, by his guardian ad litem, John A. Lydecker, recover of and from the defendants, United States Shipping Board Emergency Fleet Corporation and Consolidated Navigation Co., Inc., the sum of ten thousand ($10,000.00) dollars as found by the jury, together with $226.50, costs as taxed, amounting in all to the sum of $10,226.50, with interest thereon until paid, and that the plaintiff have execution against the said defendants, their goods, chattels, credits, and lands to satisfy this judgment therefore.

Judgment signed and entered this 22d day of July, 1927.

ALEX. GILCHRIST, Jr., *Clerk.*

35 In United States District Court

[Title omitted.]

Bill of exceptions

Before Hon. THOMAS D. THACHER, J., and a jury

NEW YORK, *June 14, 1927.*

[Appearances of counsel omitted in printing.]

A jury was impaneled and sworn.

Adjourned to Wednesday, June 15, 1927, at 10.30 a. m.

36 NEW YORK, N. Y., *June 15, 1927.*

[Trial continued]

Plaintiff's opening

Mr. AXTELL. If the court please, and gentlemen of the jury. The facts in this case that we expect to prove are as follows:

The plaintiff, a boy about eighteen or nineteen years old, was an able seaman, had had three years' experience on the steamship "Coelleda" of the defendant company. She made a trip to Swansea, Wales, where she loaded coal. On or about the 5th or 6th day of March, while she was some two or three days out of Swansea, and being overloaded, being unseaworthy due to a leak in her afterpeak, and unwieldly and unsteerable, going off as many as fifteen or twenty degrees, or 20 or 30 points, taking seas on her leeside and in her windward side, unable to keep her nose properly into the storm which was going on, this boy was ordered by the chief cook, he then having been promoted from the job of able seaman to second cook, to dump very large, heavy can of ashes over the side.

This vessel is of unusual construction. She is one of the Hog Island vessels, of which there were some fifty or so, made at a tremendous expense (for which this defendant was not to blame), but they had an unusual construction, in that the rail, where these ashes had to be dumped, was set in some eighteen inches from the edge of the vessel.

As a rule, in fact practically all, vessels carry what is known as a garbage chute or ash chute for the use of the men in the gallery to dump the ashes at sea. Some of them are made of galva-
37 nized iron with a canvas on the end to keep it from blowing up on deck, and so it will get down into the water without coming back on to the ship. This vessel was constructed, as designed in the beginning, to have a heavy, cast-iron structure permanently located on each side of the vessel to carry these ashes and garbage over this extension. In other words, the rail—I will show it to you as soon as I get a picture here. I guess we can use this picture to illustrate and make it easier. It is not in evidence but it will be.

This shows the vessel adjacent to the rail looking aft [indicating]. Here is the end of an alleyway that runs athwartships, or across the vessel. A man comes down on the inside and he has got to get the ash can out over that pocket [indicating].

While attempting to do this and while holding this heavy can, which he managed to get there alone somehow on top of the rail, one foot through the rail, the vessel got on the other side of the wind and a big sea came aboard, caught the can and him and crushed the can down on top of him injured him in this part [indicating] by pressing him against the rail below, washed him somewhere and struck his head against something and knocked him unconscious.

As a result of that, he was incapacitated, but the captain of the ship came, and took him out of the hospital, and compelled him to work, taking him forcibly from the place where he was sleeping or lying and into the galley and putting him at work.

He had already had hemorrhages from the mouth which is believed to have come from some lesion in the lungs due to the injury or the crushing that he had in this wash of the sea. No ribs were actually broken, as far as we can find out; at least, the X-ray plates do not disclose it, but he was required to turn to in that condition.

38 He was partially blind from shock or something, some injury to the nerve in one eye, and I guess both eyes are still in that condition. At the present time he is in the condition of incipient or perhaps advanced tuberculosis, and it is claimed that this condition is due, not only to the injury that occurred at that time, but to neglect on the part of the master in requiring him to work, instead of letting him lay up. He was taken off the ship by order of the consul at Azores where the vessel put in.

The vessel was in an unfit, unseaworthy condition; took 28 days to cross; was overloaded with coal before she began to leak, or before the leak filled her afterpeak full of water, and we say that the negligence here that caused the condition that this boy is in was threefold.

First, in not rendering the ship seaworthy and maintaining her that way during the voyage.

Secondly, in not having an ash chute. That is another element of seaworthiness.

And, third, in requiring him to carry this heavy can, unassisted, and dumping it; failing to have proper or smaller vessels in which the ashes could have been carried to the rail and thrown through. That is also alleged here as part of the negligence.

Then, of course, a separate cause of action of neglect to give proper treatment after the injury was incurred.

Now, I want to move——

Mr. LANDIS. Just a minute. I have not opened yet.

Mr. AXTELL. Go ahead.

39 *Defendant's opening*

Mr. LANDIS. May it please the court and gentlemen. Whatever Mr. Axtell and I may say at this time, of course, is not going to influence you in the eventual verdict you are going to bring in, because you are going to take account of the evidence. All our object is to put the two respective stories before you, to give you some idea of what is coming. If we agreed with what Mr. Axtell has just told you, we, of course, would not be in court.

As a matter of fact, we deny everything practically. We deny, in the first place, that any accident occurred to this individual as claimed. We deny that he was struck by a wave. We deny, further, that he was made to work. We admit that the man had a certain illness, apparently contracted in the service of the vessel, but probably due to an accident he had had several years previously on another ship. Immediately that accident was reported that man was relieved from duty. He was taken out of the galley, and, as a matter of fact, requested the chief officer of the vessel to be permitted to go back to work on deck. That is, the deck force being distinguished from the cook's room, you see; and he wanted to go to work as an A. B. instead of a second cook, and the captain said, "No."

He was put off the ship at the Azores and placed in a hospital there. We deny that the ship was unseaworthy. The ship was not unseaworthy. These fifty or more Hog Island ships which the Government built during the war and which did cost considerable money, as I understand it, were some of the best vessels, if not the best vessels, the Government ever built. They have an unusual factor of safety, because they were built with water-tight bulkheads to prevent their sinking in the event they were torpedoed in one particular place.

Mr. AXTELL. All vessels have that.

Mr. LANDIS. Well, let me finish my opening.

These Hog Island ships are in every way fit ships, and I think that the court will rule out any talk on their construction.

As far as the ash chute is concerned, an ash chute is primarily intended to keep the vessel clean. It is not a safety device, and we are going to produce experts' testimony that will, I believe, convince you of that fact.

Now, with regard to this matter of a leak in the stern of the vessel. We admit that she left Swansea with a slight leak in the stern. These vessels quite often leave port with weeping rivets or slight leaks. It is not unusual at all, and we will convince you of that fact, I believe, by expert testimony.

This leak at the time the vessel left Swansea was of very slight concern. It did not make her unseaworthy in any regard. She was not overloaded, as Mr. Axtell says. She was loaded just about down to her marks. As a matter of fact, in England the board of trade won't permit a vessel to sail if she is loaded below her marks. And she was properly loaded; that is, she was properly trimmed. She was down at the stern. She was not more deeply loaded at the stern than she was at the bow; however, the trim was a matter of 13 inches. That is, she was 13 inches lower at the stern than she was at the bow.

Now, it is much better for the steering of a ship to have a little more trim. However, it was impossible under these circumstances,

because they had to take a full cargo. All ships will take full
41 cargoes every time they can, of course. Consequently the engineer in using the water—they use water and fuel, of course, as they proceed on a voyage, which makes the ship lighter; and by the time this accident was supposed to have happened the ship had used about one hundred and some odd tons of fuel and water. These were used in the forward end of the ship so as to lighten the forward end and bring her up and be able to permit her to buck the heavy seas much better and prevent her taking water over the forward decks, you see. The water in the stern was thought by the ship's officers to be a good thing. There were only nine tons in there at the time this accident was supposed to have happened, which had really no appreciable effect on her draft, you see, except perhaps to put her down about a half an inch more at her stern than she would have been without it in there. But with those nine tons or so of water in her afterpeak, which is at the immediate stern of the vessel, and the water and fuel which had been used, lightening her at the peak, gave her a better trim than she had had at the time she sailed and at the time of the happening of this accident than she perhaps had for the rest of the voyage.

Mr. AXTELL. I move, in accordance with the notice served on the 26th of February, 1927, for leave to amend the complaint by changing the words "$30,000" to "$50,000" in the prayer for relief in both causes of action.

Mr. LANDIS. If your honor please, I would like to have Mr. Axtell designate how much of that additional $20,000 is for the first cause of action and how much is for the second cause of action. He sued originally for $30,000.

Mr. AXTELL. Ten thousand on each.

The COURT. Is there any objection to that?

42 Mr. LANDIS. No, I do not think so.

Mr. AXTELL. That amendment is made on account of the changed condition of the man since the action was commenced.

BENJAMIN LUSTGARTEN, the plaintiff herein, called as a witness on his own behalf, having been first duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. I am going to stand over here and ask you to talk loud enough so I can hear you. Speak so these gentlemen over here [indicating] can hear you without straining their ears.

Q. Now, then, you are the plaintiff in this case? A. Yes, sir.

Q. I can not hear you. A. I said yes, sir.

Q. I can't hear you. A. I said yes, sir.

Q. Can't you talk louder than that? A. I said yes, sir.

Q. Talk louder. Are you feeling very well today? A. Nervous.

Q. What? A. Nervous.

Q. Well, do you always talk as low as that? A. Yes, sir, all the time.

Q. You never talk louder? A. No.

Q. How old are you? A. I am 19 years old.

Q. When will you be twenty? A. November 15, 1927.

Q. I can't hear that? A. November 15, 1927.

Q. What was your occupation? A. I was an able-bodied seaman.

Q. How long did you go to sea? A. About three and a half years.

43 Q. Are your father or mother living? A. No.

Q. Were you a member of the crew of the steamship "Coelleda"? Answer yes or no A. yes, sir.

Q. What was your job on that ship? A. I was an able-bodied seaman.

Q. What were your wages on that vessel? A. 62.50.

Q. Did you get your board and lodging besides? A. I got my board and lodging, yes, sir.

Q. Just say yes or no to all questions. If I need any more information I will follow it up. Now, did you take the job of second cook while the vessel was in Avonmouth, England? A. I did.

Q. Yes? A. I did.

Q. What wages did you receive in that job? A. I received $80 a month. I received eighty.

Q. And your board and lodging? A. And my board and lodging.

Q. Do you remember the month or year when this employment took place? A. I remember it was in 1926 but I don't remember what month.

Q. About what time of the year? The complaint alleges that—Well, did you have an accident on the ship? A. I had an accident, yes, sir.

Mr. LANDIS. If your honor please, I would, I would like to ask that the plaintiff's witnesses be excluded from the court room while this witness is testifying.

The COURT. Is there any objection?

Mr. AXTELL. To what?

Mr. LANDIS. I would like to have the plaintiff's witnesses excluded from the court room while he is testifying.

Mr. AXTELL. Are there any of the defendant's witnesses here?

Mr. LANDIS. This gentleman here.

44 Mr. AXTELL. This gentleman is not a material witness as to facts, is he?

Mr. LANDIS. No.

Mr. AXTELL. No objection to his staying.

The CLERK. All other witnesses kindly remain outside the court room.

Mr. AXTELL. I do not think they can possibly hear because I cannot hear from here. But if the Government wants them out in the hall, that is their privilege.

Q. Do you remember where the vessel was at the time the accident occurred? A. It was on the second or third day out of Swansea, Wales.

Q. What were the weather conditions at the time? A. It was fairly heavy weather.

Q. Do you know what the condition of the ship was? A. She was leaking in her afterpeak and in her lazarette?

Mr. LANDIS. If your honor please, I am going to object to this unless he is required to state the ground of his knowledge.

Q. Well, what knowledge do you have? How do you know she was leaking? A. Well, I was back aft and in the forecastle because the captain wouldn't let me stay——

Mr. LANDIS. If your honor please, that is not responsive to the question.

Mr. AXTELL. He is trying to tell what knowledge he had.

By the COURT:

Q. What did you personally know about the ship leaking; something somebody had told you? A. I had been living right over the top——

45 Q. What did you know of it? A. Every time I came down in the forecastle I could see the water swishing around.

By Mr. AXTELL:

Q. Did you ever look in that lazarette? A. Every night until the time of the accident.

Q. When did the leak begin? A. It was leaking while we were laying alongside the dock in Swansea, Wales.

Q. Before or after she began to load? A. After she began to load.

Q. What was she loaded with? A. She had a castle.

Q. Had what? A. A castle.

Q. What was she loaded with, I said? A. Oh, coal. She had a castle——

Q. How deeply was she loaded? A. She was loaded up to her waterline. I didn't notice whether up to the Plimsoll mark.

Q. Do you know whether she had one or not? A. I think she did.

Q. Did you ever see it before this time when she was loaded? A. Yes, sir.

Q. Did you see it after she was loaded? A. No, sir.

Mr. LANDIS. If your honor please, let us find out exactly when he didn't see it after it was loaded. He said he did not know, a moment ago, whether it had a Plimsoll mark or not. Now, he has said, under the guidance of counsel, that he did see it before it was loaded and after it was loaded.

Mr. AXTELL. I think you misunderstood. We will have the stenographer repeat that.

46 Mr. LANDIS. He just said he did not know whether she had a Plimsoll mark or not.

Mr. AXTELL. Counsel is quoting evidence now, and I would like to have that evidence read.

(Record read by the stenographer.)

Mr. LANDIS. I object to that on the ground that it indicates that it was loaded below the Plimsoll mark when he did not know, as a matter of fact. He did not remember seeing it at the time when it was loaded.

The COURT. He could not see it if it was loaded below.

Mr. LANDIS. And it was not loaded below, if your honor please. That is the implication the jury gets from this. I would like to have him state when he looked at the Plimsoll mark.

The COURT. You may develop that on cross examination. Objection overruled.

Mr. AXTELL. There will be lots more evidence and you can go into it.

Mr. LANDIS. May I have an exception, if your honor please?

The COURT. Go ahead.

By Mr. AXTELL:

Q. What observation did you make of this particular loading? A. I wasn't sure that night when I come back to the ship and the ship was loaded, just right alongside of the dock. You couldn't see the waterline unless you went on the offshore side.

47 Q. Did you notice how she was taking the seas before your accident? A. On the starboard side; that she was——

Q. About how much on the starboard side? A. About half a point or a point.

Q. Did you notice how she was steering? A. She was steering very badly.

Q. What do you mean by that? A. She was always a bad steering ship.

Q. Have you ever steered her? A. Yes, sir.

Q. You have steered her yourself? A. Yes, sir.

Q. On the way over? A. On the way over.

Q. Did you notice how she was steering on the day that you got hurt? A. I looked back in the morning, after I came back——

Q. Answer yes or no, Mr. Lustgarten? A. Yes, sir.

Q. Always stop and think and say, "Can I answer this yes or no"? If you can, answer it that way, because otherwise we will have a lot of evidence here that we will have to strike out.

The COURT. That will be my province. Go ahead.

Mr. AXTELL. Excuse me.

Q. Now, how was she steering? A. Very badly.

Q. Describe what you mean by that? A. She would swing off anywheres from 15 to 20 degrees, or 10 degrees before you could catch her. It was a ship that would either carry a half a turn a-port wheel, or half a turn a-starboard wheel. It was either swinging more to port and carrying her starboard or just the opposite. In

fact, one watch she would swing port and one watch would swing starboard.

Mr. LANDIS. If your honor please, I move to strike all this
48 out. All we are concerned with is how she was steering at the time this accident occurred, and this witness is testifying how she was steering at other times. Yesterday he said he did not know how she was steering at the time the accident occurred.

The COURT. I will let it stand for the present; I will not strike it out.

Mr. LANDIS. May I have an exception?

Q. Did you observe how much she was swinging out of line on the day of the accident? A. In the morning I did.

Q. Did you observe how she was steering the day before? A. I did.

Q. And the day before that? A. I did.

Q. Now, describe the way she was steering; what you observed on those days? You were not then, I take it, a helmsman; you were a cook?

Mr. LANDIS. I object to this, if your honor please, on the grounds that however she may have been steering at those times is of no consequence in this case. The only question is——

The COURT. I will overrule that. You may reserve the motion to strike out after the plaintiff's testimony is in.

Mr. LANDIS. I will reserve the motion.

A. The ship was swinging when she came out of the dock. She was—she had tugboats and when she got out of the locks into the Bristol Channel then you could notice from her wake that she was steering very badly.

Q. Did it improve any from that time on till the time of the accident?

49 Mr. LANDIS. Just a moment. I am going to move to strike that testimony out, if your honor please. It seems to me it is peculiarly prejudicial because his testimony how she may have steered on the first day out of Swansea creates an effect upon the jury, certainly, that she was doing that all the time. The only question that is really material here is whether she was steering that way at the time this accident occurred, because Mr. Axtell is going to connect up this swinging of the ship, by reason of the fact that she was yawing around, because they couldn't steer her, and the ship not being in line at this particular moment——

The COURT. I do not know what he is going to try to do. I will rule as before, overrule the objection.

Mr. LANDIS. May I have an exception?

Q. Now, getting down to the day of the accident and at the time of the accident; what time of day was it? A. It was right after supper, between 6 and 7.

Q. You were then second cook? A. Second cook; yes, sir.

Q. Who was the chief cook? A. There was some Spanish fellow.

Q. What were his duties and what were your duties? A. Well, his duties were to do the cooking and my duties the baking and the cleaning of the galley with the help of the chief cook.

Q. Now, did you get orders from anybody in your work? A. From the chief cook.

Q. Your answer is "Yes," I take it? A. Yes, sir.

Q. Who gave you the orders? A. The chief cook.

50 Q. Did you get orders from anybody else? A. No, sir.

Q. You received all your orders from him? A. Yes, sir.

Q. Did he give you any orders that day? A. He gave me——

Q. Yes or no. Did he give you orders that day? A. Yes, sir.

Q. What orders did he give you that day? A. You mean in the morning.

Q. Any time that day? Just in a general way what orders did he give you that day? A. Well, he told me to set a batch of bread at 7 o'clock in the morning, make my puddings at 8.

Mr. LANDIS. If your honor please, I am going to object to this now. This is certainly not anything that has anything to do with it.

The COURT. I do not see what possible bearing it has.

Mr. AXTELL. All right.

Q. Did he give you any order with reference to dumping ashes? A. He told me to clean the stove.

Q. Yes or no? A. Yes, sir.

Q. What order did he give you? A. He told me to clean both fires in the stove and not to leave them burn overnight because we were saving that special coal she had for the galley.

Q. Did he give you any other orders about it? A. He hold me to take all the ashes out and dump them overboard.

Q. Did you have any tools or appliances with which to do that? A. We had a large can.

Q. Describe the can? A. The can was between two and three feet high and about a foot and a half in diameter.

51 Q. Was there anything else provided? A. There was not, sir; no sir.

Q. Were there any smaller buckets or pails there to use for that purpose? A. No, sir.

Q. Were there any provided while you were on the ship in that capacity? A. No, sir.

Q. What were you told to do with the ashes? A. I was told to dump them overboard.

Q. Tell everything that occurred from then on, the conversation you had with the chief cook about it, and what you did? A. It was just at supper time, after supper was served——

Q. A little louder. A. Just at supper time, after supper was served and everything was just about finished in the galley, the chief cook and myself were going to eat and the chief cook asked me to dump the ashes overboard before they got cold, because they stuck

to the side of the stove. And I went into the galley and emptied both fires, put them in this can, and it was very heavy, and I asked the chief cook if he would help me dump it over the side.

Q. What did he say? A. He said "No." He says "I am eating supper now." He says, "That is your job anyway."

Q. What else did he say, if anthing, then? A. Then he didn't say anything——

Q. A little louder. A. He didn't say anything and I took the can and dragged it out of the galley to the side of the ship and then I had to lift it over the rail and get the can over.

Q. I show you a picture that is marked "Plaintiff's Exhibit 2" in blue pencil; is that a picture of the side of the ship at the point where you were dumping the ashes? A. It is the same side; yes, sir.

52 Q. There is a man standing in front of the rail at that point? A. Yes, sir.

Q. How much space is there at that place? A. You mean the walkway?

Q. That is, how wide a place is the rail there where you dump the ashes? A. Between the rail and the side of the ship?

Q. Yes. Where is this place located, anyway? A. It is on the port side of the ship.

Q. Port side where? A. Of the ship.

Q. Where abouts on the port side? A. In the amidship deck; in the after part of the amidship deck.

Q. On the after end of the amidship deck? A. Yes, sir.

Q. Is this a sketch that you handed into me this morning? A. Yes, sir.

Q. Which you meant to use to illustrate where you got hurt? A. Yes, sir.

Q. Can you show us with this? A. Right here [indicating].

Q. That is the flat deck [indicating]? A. Yes.

Q. Let us take first this: What is this supposed to be, the ship, whole length and everything? A. Yes, sir.

Q. That is your conception of it, is it? A. It is straight fore and aft.

Q. This point you marked up here with an X——

The Court: Step down and show the jury.

(Witness does as requested.)

Q. Does this place that is marked with an X indicate the after end of the amidship deck, as you call it? A. Yes, sir.

53 Q. Now, is this plan down here supposed to be a floor plan looking down on the after end of the amidship structure? A. Yes, sir.

Q. Can you show us there where it was you got hurt? A. Here is the port alleyway, here is the galley and here is a door [indicating].

Q. Just make marks where you are calling off those things. Just put that pencil down again so I will know where you mean. A.

[Indicating.] Here is a door for the port alleyway; here is a doo leading out of the galley [indicating].

Q. Just let me mark that.

Mr. LANDIS. If you honor please, I object to this plan. It is no accurate and it is not true. The mess room is not in this position.

The COURT. That is not for you to say.

Mr. LANDIS. He is showing it to the jury.

Mr. AXTELL. I concede that this boy made it and gave it to me.

The COURT. You will have to lay the foundation.

Q. Just put a mark——

The COURT. You will have to lay the foundation before you sho it to the jury.

Q. Did you make this drawing? A. Yes, sir.

Q. Is that the best drawing you can make of that ship? A. It i an exact drawing.

By the COURT:

Q. Does that fairly represent your recollection of the arrange ment? A. It is the absolute drawing as to the galley and the alley ways and the mess rooms, are true as they were in all Hog Islan ships.

54 The COURT. It may be received in illustration of his testi mony.

Mr. AXTELL. I ask that it be marked "Plaintiff's Exhibit 1."

(Marked "Plaintiff's Exhibit 1").

By Mr. AXTELL:

Q. Now, this part here which you have drawn up in front, yo have made a pen mark "A." Do you see that? A. Yes, sir.

Q. What was the place marked A? A. It is the port alleyway.

Q. The port alleyway. What is this over here [indicating]? A It is the galley.

Q. Mark something there, put a B there. A. [Witness does a requested].

Q. That is B. That is meant to be the galley. Now, there i another arrow there. What is this [indicating]? A. This is th starboard alleyway.

Q. You have got the alleyways too wide. That was the trouble with Mr. Landis. Now, then, you came out of the galley and went where with that bucket? Does that dotted line you have drawn there indicate where you went [indicating]? A. Yes, sir.

Q. That is, you came out of that door, out of this alleyway and down the deck? A. Yes.

Q. And this strip down the deck, that is the same kind of alley way? A. That is the walk.

Q. There is a rail to the deck? A. There was.

Q. We will call this rail R. That looks aft on the ship, doesn't it? A. Yes.

Q. Make an arrow pointing aft, and this would be forward up here. Mark that "F" for forward. A. [Witness does as requested.]

55 Q. This would be the port side and this would be the starboard [indicating]. Now, how wide is that alleyway back here that you walked along? A. About two and a half, three feet.

Q. Show us with your hands. A. [Witness does as requested.]

Q. That is about three feet, I should think. You got down to this point [indicating]. Can you see this? A. Yes, sir.

Q. Now, that place there; what is there across there? A. There is a rail.

Q. Is that the rail that is shown on this photograph which has already been marked "Plaintiff's Exhibit 2"? These rails, can you see them? A. Yes, sir.

Q. That is the place, is it? A. Yes, sir.

Q. From one end to the other of that railing, as far as you can see it on this picture, is how long? A. Three feet.

Mr. AXTELL. I offer this photograph as "Plaintiff's Exhibit 3." It is already marked.

(Marked "Plaintiff's Exhibit 2" in evidence.)

Q. Now, I show you another photograph marked "Plaintiff's Exhibit 3" and I ask you what this is? A. Looking from forward to aft on the port side of the ship; looking back aft.

Q. Where was the camera when that was taken? A. Forward.

Q. Was it on the outside of the vessel? A. It was on the outside of the ship.

Q. That is, of this rail or what you call it, walkway, that goes along there? A. Walkway. He must have been on the outside of the rail.

56 Mr. AXTELL. I offer that as plaintiff's Exhibit 3.

(Marked "Plaintiff's Exhibit 3" in evidence.)

The COURT. We will take a recess until 2.15.

Afternoon session

BENJAMIN LUSTGARTEN resumed the stand.

Direct examination by Mr. AXTELL (continued):

Mr. AXTELL. I will offer the operating contract as plaintiff's Exhibit 4.

(Marked "Plaintiff's Exhibit 4" in evidence.)

Q. Now, I show you another picture and ask you if that is a photograph of the place where you were dumping the ashes? A. It is, sir.

Mr. AXTELL. I offer that in evidence as plaintiff's Exhibit 5.

(Marked "Plaintiff's Exhibit 5" in evidence.)

Mr. AXTELL (handing plaintiff's Exhibit 5 to the jury). This is looking outboard and that is the place, which is the port side.

Q. I show you another picture and ask you if that is a picture of the ship taken from a dock showing the port side of the vessel at the point where the ashes were being dumped? A. It is.

Q. These ink marks on there show about the place where
57 you were actually engaged in doing the work? A. Yes, sir.

Mr. AXTELL. I offer that as plaintiff's Exhibit 6.

[Marked "Plaintiff's Exhibit 6" in evidence.]

Mr. AXTELL. That just shows a view looking at the side of the ship. You see, that is the after end of the amidships structure [handing exhibit to the jury].

Q. Was there any ash chute attached to the vessel or provided on the vessel at that place where you were dumping the ashes? A. Well, there was no ash chute at the place where it was supposed to be, but there was—they had an ash chute there in the forecastle.

Mr. LANDIS. If your honor please, I move to strike that out.

The COURT. Strike it out.

Q. Mr. Lustgarten, if you will just confine yourself—I tried to tell you this morning. Answer questions yes or no and say no more.

Q. Was there any ash chute at the place where you were dumping the ashes at that time? A. There was none.

Q. Was there any ash chute on the other side, the starboard side, of the ship at that time? A. There was not.

Q. Had there been any ash chute provided on the ship at that place at any time during the voyage? A. There was not.

58 Q. Did you ever see any ash chute on that ship? A. I seen one in the forecastle head, underneath the forecastle head in the fore peak.

Q. What was it made of? A. Galvanized iron.

Q. Was it ever in use on this ship? A. Not that I ever seen it.

Q. Have you seen ash chutes on other vessels? A. I seen ash chutes on every ship I have been on.

Q. Or garbage chutes? A. I have seen ash chutes on every ship I have been on.

Q. Describe them; what they are made of and how they are constructed? A. On some ships they have an ash chute made out of wood and a piece of canvas at the end of it, and they used to put it on the lee side of the ship to dump ashes overboard so that they won't get the ship's side dirty and for safety of the man in case—in that case it does not——

Mr. LANDIS. If your honor please, I move to strike out that "for the safety of the men."

The COURT. Strike it out.

Q. Well, you have seen them in use on other vessels? A. Yes, sir.

Q. Did you make any request for the use of an ash chute on this ship? A. I asked the chief cook.

Q. What did you say to him? A. I told him we ought to have an ash chute on the day—on the day before, and he told me that they didn't have any on it since he has been on and he wasn't going to bother putting up any now.

Q. Well, did you ever ask for any smaller utensil or bucket with which to handle the ashes in dumping them than that which you had at that time?

Mr. LANDIS. If your honor please, I would much prefer Mr. Axtell did not lead the witness quite so much.

59 The COURT. I do not think you ought to lead him. He had a conversation which you can ask for.

Q. State what conversation, if any, you had with the chief cook regarding the dumping of these ashes on that day of the accident, or any other day before that. A. Well, on the day of the accident we got finished with supper, sitting down, and the chief cook ordered me to dump the ashes. He wasn't much of a pleasant fellow, and I told him—I asked him to give me a hand. He says, "Take the ashes out and dump them." And I couldn't refuse.

Mr. LANDIS. If your honor please, I move that that be stricken out.

The COURT. Yes. Now, Mr. Lustgarten, you must confine your answers to statements of what was said to you and what you said to the person you were talking with and to a description of what you saw or what you did or what happened. It is not your function to theorize or speculate as to beliefs and purposes or anything else. Give this jury the facts as they happened; what was said and what was done.

Q. Now, Mr. Lustgarten, what did he say to you and what did you say to him about dumping these ashes on the night that you got hurt? A. We had a little argument in the galley about dumping the ashes. He told me if I didn't dump the ashes he was going to call the captain down, report me to the captain, and I took the ashes out and dumped them because I didn't want to be confined.

Mr. LANDIS. If your honor please——

60 The COURT. That is an illustration. Why you did it has not been asked for. You have been asked to state the conversation. Strike out after the word "Because."

Q. Is that all that was said? A. That is all.

Q. And you went ahead and dumped them yourself? A. I did.

Q. Had you ever had assistance in dumping the ashes on this boat on prior occasions?

Mr. LANDIS. If your honor please——

A. No, sir.

Mr. LANDIS. All right, I will withdraw that.

Q. What were the weather conditions at the time this conversation with the chief cook took place? A. It was very heavy weather.

Q. Did you notice whether any seas were coming aboard or had come aboard on that deck on that day? A. I did.

Q. What had you noticed? A. I noticed the seas coming over starboard——

Mr. LANDIS. If your honor please, I object to the materiality of this, whatever seas may have come over there before.

The COURT. Objection sustained.

Q. Did you say anything or have any conversation with the chief cook about the weather conditions at that time? A. I told him——

Q. Yes or no? A. Yes, sir.

Q. Your answers should be yes or no. A. Yes, sir.

61 Q. What conversation did you have? A. Well, he told me to dump the ashes and I asked him to give me a hand. He refused.

Q. I asked you this question; I will repeat it: Did you have any conversation with the chief cook about the weather conditions? A. Yes, sir.

Q. Prevailing at the time of the accident? A. Yes, sir.

Mr. LANDIS. I am going to object to that as leading, if your honor please.

The COURT. It is very leading.

Mr. AXTELL. Well, I don't know.

The COURT. You may have exhausted his unrefreshed recollection, but it does not appear. What else was said; tell us all that you can remember now about this conversation. Is there anything that you haven't told us?

The WITNESS. Well, just—well, the chief cook told me to dump the ashes, and I asked him for his assistance; he refused to give me it and told me to dump it myself, and I took the bucket out, as I was ordered, and dumped the ashes over the side.

By the COURT:

Q. Now, have you told us everything you can remember about that conversation? A. Except that the chief cook had an argument with me.

Q. This talk about the captain. Is there anything else that you have not told us? A. Just the argument I had with the master—I mean with the chief cook.

Q. What was that? A. About the dumping of the ashes.

62 Q. What was said? A. Well, he ordered me to dump the ashes, and I asked him for his assistance and he refused.

Q. Is there anything else that was said by you or by him? A. No, sir.

By Mr. AXTELL:

Q. Then what happened to you? Go ahead and tell how you dumped the ashes and what happened. A. I dragged the bucket over—I dragged the bucket out of the galley door to the port side of the ship, and I had to put my foot out to the side of the ship because it was about 14 inches away.

Mr. LANDIS. If your honor please, we think that this man should give us what happened, and I would much prefer that he confine himself to stating what he did, not why he did it.

The COURT. I will let that stand.

Q. Will you take this photograph marked "Plaintiff's Exhibit 5"——

Mr. LANDIS. May I have an exception?

Q. And can you illustrate with the use of that photograph what you did and how you did it? Yes or no; can you? A. I can.

Q. All right. If you will hold the picture up so the jury can see it——

The COURT. No; step down and show it to them.

A. (Witness does as requested.) They had a rail about as high as this [indicating].

63 Q. [Indicating to his breast.] A. Right here [indicating] and the side of the ship was about that far up.

Q. [Indicating about 15 inches.] You mean inside of the rail? A. And had a rail about that low [indicating].

Q. Had another rail about that low [indicating about 14 inches above the deck or floor]? A. (Continued.) And I had to put my foot in through the side and there was another piece of steel coming up from the scupper.

Q. Can you show us on this picture or either of them? Perhaps you can by Exhibit 3. A. Yes, sir.

Q. That is the scupper which you mean [indicating]? A. Yes.

Q. What did you put your foot through? A. The top here.

Q. Over that rail also? A. Right here.

Q. The toprail shown on Exhibit 3; you put your foot over that; is that right? A. Yes, sir.

Q. Then what did you do with the can?

The COURT. That was Exhibit 1 you were referring to?

Mr. AXTELL. It has been marked twice.

The COURT. Oh; very well.

A. And the can was sitting down here and I dragged—put my foot through there [indicating] and I lifted the bucket up until the bucket set about a foot and a half, and I just reached about to my knees, and just as I got the bucket a very heavy—there was a very heavy spray and the ship logged right over, just like—seemed as if she was wallowing right over, and I was leaning up against the rail, and just then the bucket rolled right over me.

64 Q. What was the spray? You mean the water hit you? A. Yes, that was it; a fairly heavy spray.

Q. What happened to you then? A. Well, then, I was knocked unconscious. I don't know what happened.

Q. Do you know whether you were injured any at that time or not? A. Well, my head was mashed and my chest.

Q. What hurt your chest, do you know that? A. Well, the bucket was lying right down on me.

Q. I don't quite understand how the bucket came down on you. A. Well, it was on the rail.

Q. The bucket was on the rail? A. On the top rail and just dumping over, the edge of it over the side. Just then this went right in my face and that is the last thing I remember.

Q. Where did you come to? A. In the hospital.

Q. What was your condition when you came to? A. I was—I couldn't open my mouth. It just seemed to be burning up. I had pains under the chest.

Q. A lit'le louder. A. I had a pain under the chest and on the chest.

Q. Indicating the lower part of your chest and the top of your stomach, I should think? A. Right here [indicating].

Q. Your diaphra'm or somewhere around there? A. I just had a headache and I can hardly see anything.

Q. Can you take your glasses off for a few minutes? What do you wear those for anyway? A. (Witness does as requested.) They prevent headaches and sun bothering me.

Q. They do not help your sight any? A. Oh, yes.

Q. I mean they are not to see with, are they? A. They help some.

65 Q. Well, they are dark glasses, aren't they? A. You can see. They make your eyes rest.

Q. Do you remember whether you were wet by this spray, as you call it?

Mr. LANDIS. If your honor please, I object to this. It is leading.

The COURT. He may answer that. Do not lead him.

Mr. LANDIS. Note my exception.

Q. Will you describe the condition of your clothes? A. Well, I had my under pants on and they were still damp when I came to.

Q. What time was it when you came to, do you know? A. It was on Mr. Abbott's watch, the second officer.

Q. What is that? A. The 8 to 12 watch.

Q. The 8 to 12 watch. Do you know how long before 12 it was or how long after 8, or was it before 8?. A. You mean the time of the accident?

Q. No, the time that you came to? A. No, I don't know what time it was.

Q. Mr. Abbott was there, was he?. A. Yes, he was there.

Q. Was he supposed to be on the bridge? A. I don't know.

Q. Was he on the 8 to 12 watch? A. He was on the 8 to 12 watch.

Q. Well, if he was on the 8 to 12 watch he would be on the bridge between 8 and 12, wouldn't he? A. He used to come down to see me while he was on watch.

Q. He couldn't leave the bridge while he was on watch; you don't mean that, do you? A. No.

Q. Anyway, you saw Abbott; is that right? A. What is that?

66 Q. You saw Abbott there? A. Yes, sir, I seen Abbott.

Q. What did he do for you? A. Well, he took some vaseline or something of the sort and rubbed it on my face and back, and asked me how I felt, and washed my face for me and gave me a good dose of Epsom salt, and that is all they had. That is all they give me.

Q. Did you notice anything else? Did you notice anything else about yourself besides that at the time? A. No, sir, I was in too much pain to be thinking——

Q. Where did you have the most pain? A. The most pain was in the head.

Q. What part of your head hurt? A. Well, it was this side that was swelled [indicating] and over here.

Q. You are indicating first, "as this side," up over your right eye, I should judge? A. It was swollen up here.

Q. And then you indicate the other side about the left side of your jaw? A. Right up here and right down here.

Q. Well, go ahead and tell what they did for you and what you did on the ship from then on. A. Describe the day after the accident?

Q. Right along, just tell the narrative, the story of what occurred on the vessel from this time that you regained consciousness until you left the ship? A. I was laying in the hospital early in the morning. Mr. Abbott came down to see if he could do anything for me. That was the second time he had been down that day, and after that I went—I must have fell asleep and I woke up. I could hardly breathe, so either somebody called the second mate
67 again or somehow he was there, and he had the port holes open and I couldn't catch my breath, and Abbott closed the port holes and dampened by tongue and helped me out and doctored he up a bit, and I fell asleep again until the 2 o'clock—it must have been earlier than that; about 11 o'clock the next day, the captain came in and there was another man laying in the hospital.

Q. Now, a little louder. A. There was another man laying in the hospital and the captain told him to go to work, that he was shorthanded, he needed a mess boy. And so this man couldn't do it, couldn't get out of his bunk, so the captain—I had the lower bunk near the door; the captain came up to me and he says, "I want you to turn to." And I looked at him, I thought he was kidding with me. So then he leaned down and grabbed me by the back of the neck and sat me up in the bunk, told me to get dressed and turn to in the mess room. I told him I couldn't do it, that I was sick. He says, "A few bruises won't hurt you," he says.

Q. What? A. He said, "A few bruises won't hurt you."

Q. He said, "A few bruises won't hurt you"? A. Yes.

Q. Did he say anything else or did you say anything to him? A. Then I started—somebody stole my shirts.

Mr. LANDIS. If your honor please, I object to that.

The COURT. Strike it out.

Q. Tell what you said or what he said. Did you say anything to him about your condition or how you felt? Did you have any conversation about that? A. I made a conversation and he told me to get dressed and my clothes wasn't there.

68 Q. Your what? A. My clothes.

Q. Were not there? A. Were not there.

Q. Yes. A. So he went and got my stuff.

Q. He what? A. He got some clothes for me.

Q. Yes? A. Got dressed, and he give me my clothes, made me get dressed and he took me out of the door and told me to go to work. He took me in the galley first.

Q. How do you mean he took you out? A. He had me under the arms here [indicating].

Q. Indicating the left arm near the shoulder? A. He took me into the door of the galley and the chief cook and himself were talking and he says, "Well," he says, "I will put him in the mess room and let him do the work there, light work there," he says; "when he gets finished there in the afternoon he can help you in the galley."

So I took the stuff from the galley to the mess room and set everything on the table and that was the first time that I got the hemorrhage.

Q. What happened then? A. Then the chief cook had set a batch of bread in the morning, he told me just at the time to mold it and put it in the pans. Well, I just bent my head under the bucket—entered the wooden bin you make your bread in and came right up, I just coughed a whole big clot of blood right up in the bread.

Q. Who was there at the time? A. There was quite a few around the galley at the time.

Q. Had you ever had anything like that before that time? A. Never had anything like that.

Q. Never in your life? A. Never.

Q. Had you ever been in the hospital for tuberculosis? A. No, sir.

Q. For sickness of the lungs or anything of the kind? A. No, sir.

69 Q. Or trouble with your head? Had you had any trouble of that sort before that before? A. No, sir.

Q. Go ahead and tell what happened then. Did you continue working there after that? A. No, sir, the chief cook must have told the captain.

Mr. LANDIS. If your honor please, I move that be stricken out.

Mr. AXTELL. I consent.

The COURT. Strike it out.

Q. Just tell what happened. A. They dumped the bread overboard and I went back to the hospital and nobody ordered me to turn to that day again.

Q. Were you ordered to turn to any day after that? A. No, sir; not after that.

Q. Go ahead and tell what happened the rest of the trip? A. The rest of the trip, I was just walking around with a terrible pain. The very next night I didn't sleep and I think for three nights I didn't sleep. I used to sit up, lay down and walk around. I couldn't fall asleep; in terrible pain.

Q. Where did you have pains? A. In my head and chest, always had a nauseous feeling like I was going to vomit, and I couldn't eat, felt faint.

Q. On this occasion when the captain took you by the arm and marched you into the galley, did he have any—did he look you over, examine you and ask you questions as to what was the matter with you first? A. He never even asked me one question, except that after the dinner was served I think Mr. Abbott thought he better—after I got into the mess room Mr. Abbott came down and he said, "You better come up and see the captain." He says, "You better be
70 in bed." That was after the captain had taken me into the mess room. And I went up to the bridge with him and the captain was on the bridge then, and he says, "Mr. Abbott, I ordered that man to go to work, and that is all." Mr. Abbott took me down and from then I continued as I told you before.

Q. The captain said that. Do you know whether you had a medicine chest made up on this ship or not? A. In the cook's room——

Mr. LANDIS. If your honor please I object to this. It is immaterial and has nothing to do with this case.

The COURT. Objection sustained.

Q. How big a man is the captain? A. Six foot easy; he was about six foot.

The COURT. What has that got to do with it?

Q. Now, tell what happened on the voyage after that. Go ahead with the story. How long did it take you to get into port? A. I think it was on the 11th or 12th day we arrived in Azore Islands.

Q. How many days' sail is that ordinarily?

Mr. LANDIS. If your honor please, I object to this question as not pertinent and not material, in view of the fact that it is admitted by the defendants here anyway that they were past the Azores; that they did not make a trip direct to the Azores but that they were on their way to New York but turned around and came back.

The COURT. He may answer.

Mr. LANDIS. May I have an exception, your honor, please?

The COURT. Yes.

71 Q. How long is that trip to the Azores ordinarily, do you know? A. Well, from Swansea down it is about five days—six days for a ten-knot ship.

Q. You got in there how many days after leaving Swansea? A. On the 11th or 12th day.

Q. What happened to you there, if anything? A. Well, Abbott—well, anyway I was called up to the bridge, the second mate went with me; they had two doctors up there and the captain says—they were Portugese doctors and I didn't understand what they were talking about, but they had an interpreter, or the captain had an interpreter. He walked out of the room while the doctors were examining me and one of the doctors says, "We better take him ashore to the hospital." Which I heard the interpreter say. And

the captain asked me—asked the doctor—asked the interpreter if he could—if I could stay on the ship without any danger until we arrived in New York. The doctor says "No." The interpreter said "No." So he says, "Well," he says, "We will take him ashore and make sure." Says "We will have an X ray taken." Went ashore in a launch and went up to the hospital, had X rays taken. The doctor in the hospital, the American consulate doctors, they looked over the X-ray, told me they better pay me off.

Q. Did you go to the consulate there? A. Yes, sir.

Q. Did you go to the consulate before or after the doctors came aboard? A. After.

Q. Were you paid off there? A. I was.

Q. And left ashore there? A. Yes, sir.

Q. How did you get back to the United States? A. The American consulate helped me.

Q. On what ship? A. French passenger boat.

72 Q. Did you receive any treatment on that ship? A. Yes.

Q. From whom? A. The doctor.

Q. The doctor on the ship? A. Yes, he give me—I had a passenger card.

Q. What? A. A passenger sick card.

Q. What ship was it? A. Sinai.

Mr. AXTELL. I offer it in evidence. I can't read what ship it is.

Mr. LANDIS. If your honor please, I do not see what this proves.

Mr. AXTELL. It is not admissible if you object to it.

Mr. LANDIS. I object to it.

Mr. AXTELL. I ask that it be marked for identification.

The COURT. He said he was assisted by the American consulate to get passage aboard a French passenger boat. What more do you want?

Q. You were treated by a doctor on the way here? A. Yes, sir.

Q. Did you go to a hospital here? A. Yes, sir.

Q. What hospital? A. Marine hospital.

Q. Where at? A. Staten Island.

Q. Stapleton, Staten Island? A. Yes, sir.

Q. How long were you in there? A. 27 or 28 days, I think.

Q. What is that? A. I was 27 or 28 days. I dont exactly remember the number of days.

Q. What did they do for you there? A. Practically nothing.

Q. Have you been in any other hospital since then? A. I have been under a doctor's care in Philadelphia.

73 Q. What doctor? A. Dr. Rubin.

Q. Dr. Rubin? A. Yes.

Q. Where is he? In Philadelphia, you say? A. Philadelphia.

Q. Speak louder so we can hear you. A. Philadelphia. Dr. Rubin.

Q. Do you have relatives living in Philadelphia? A. I have a sister.

Q. Were you staying with her? A. Yes, sir.

Q. Have you lived in Brooklyn since then? A. Yes, sir.
Q. With whom? A. My cousin.
Q. Have you been in any other hospitals here? A. Kings County Hospital.
Q. How long were you in there? A. Day and a half.
Q. How did you happen to go to that hospital? A. Fell unconscious on the street; the police took me there.
Q. When was that? A. I don't know how long ago it was.
Q. What is that? A. I don't know. I think it was two or three months ago.
Q. Have you been to any other hospital than that. A. No, sir, the Well's Eye Hospital.
Q. Were you in the Eye and Ear Post-Graduate Hospital for a day or so? A. Yes, sir.
Q. In order to give the doctors a chance to look at you? A. Yes, sir.
Q. That was how long ago? A. About two and a half months ago.
Q. Have you been examined by Dr. Powers who is sitting here [indicating]? A. Yes, sir.
Q. Did he make X-rays of you at various times? A. He made X-rays.
Q. Yes or no, that is all? A. Yes, sir.
74 Q. Have you had any other injury since this one on the ship? A. No, sir.
Q. Did you have any other injury before this accident which you have described, to your lungs, or to your head? A. Only I stepped on a nail once on a Shipping Board ship.
Q. That did not hurt your head or your lungs? A. No, sir; infection.
Q. Aside from that injury to your foot from a nail have you had any other injury? A. No, sir.
Q. Have you been in any hospital at any time in your life before? If you have, say so? A. Yes, sir, I was in a hospital at Atlantic City.
Q. What for? A. Broken arm.
Q. When? A. When I was about eight years old.
Q. Now, that is twice. Any other hospital experiences besides those two? A. No, sir.
Q. What was your last ship before the "Coelleda"? A. It was either the "Westpool" or the "West Monahan."
Q. "Westpool" or "West Monahan"? A. Yes.
Q. How much time was there between the two ships? A. A week.
Q. Before that what other ships had you been in? A. "West Monahan."
Q. Before that what ship? A. "West Durphee."
Q. The "West Durphee." Before that what ship? A. "Gulf Star."
Q. Before that? A. "Eastern Gale."

Q. "Eastern Gale." What other ship before that? A. I couldn't mention all the ships I have been on.

Q. Mention them if you can. We want to give them an opportunity to look up you record and see what your condition of health was on these vessels.

The COURT. Let us move along.

75 A. Well, you can look on the discharges and see what ships [handing documents to counsel].

Q. You can refresh your recollection by looking at them. These are your discharges? A. Yes, sir. Not all of them.

Mr. AXTELL. Any objection to these going into evidence?

Mr. LANDIS. What is the use of their being introduced into evidence and cluttering up the record if they have no application to the case?

The COURT. You may mark them for identification.

Mr. AXTELL. I ask to have them marked for identification. Counsel can let them go in if he wants.

[Marked "Plaintiff's Exhibit 8" for identification.]

Q. These discharges are records of your services on these ships, are they? A. They are, yes, sir.

Q. Issued to you by the shipping commissioner? A. Yes, sir.

Q. And show the date of entry and the date of leaving? A. Yes, sir.

Q. How much did you weight when you joined this ship, do you know? A. Between 145 and 150.

Q. What means of knowing your weight have you? A. The trip before that, just before I sailed on the "Coelleda," I lost my lifeboat ticket and I went up for a lifeboat ticket again.

Q. Is that a ticket you have to have to ship as an able seaman? A. It is.

Q. Were you examined physically at the time? A. Yes, sir.

76 Q. Were you weighed? A. No, I wasn't weighed I don't think.

Q. Well, I asked you if you had any knowledge of your weight. Do you know what you weighed from any source? A. Between 145 and 150.

Q. When did you weigh yourself before this trip? A. As soon as I came home from the "Westpool."

Q. What do you weigh now? A. 126 pounds.

Q. How do you know that? A. I weighed myself.

Q. When? A. Dr. Carhart's office.

Q. That was how long ago? A. Last week.

Q. Last week. A. Two weeks ago.

Q. How much did you weigh when you got back to the United States? A. I don't know.

Q. How much did you weigh when you entered the United States Marine Hospital at Stapleton, Staten Island, do you know that? A. No.

Q. Do you know whether they weighed you at that time? A. They did but I——

Q. They would have a record of it there? A. Yes.

Mr. AXTELL. Your witness.

Cross-examination by Mr. LANDIS:

Q. Mr. Lustgarten, let us get at the time of this accident a little more definitely, please. When did the ship sail from Swansea; on what day, do you remember? A. I don't remember the date.

Q. Was it March 2nd? A. I couldn't tell you the exact date; I don't know. I didn't have nothing to refresh my memory by as to the date.

Q. You made affidavits, I believe——

77 Mr. AXTELL. Will you pardon me, Mr. Landis? I want to ask for leave to ask one or two questions which I do not want to come in after your cross-examination.

Mr. LANDIS. Yes.

Direct examination (continued) by Mr. AXTELL:

Q. Have you had hemorrhages at all since that time on the ship? A. Yes, sir.

Q. Will you tell the jury how much and to what extent and when it occurred? A. Practically every day; every day coughing, spitting blood all of a sudden.

Q. I judge that on the first occasion there was quite a quantity of blood came from you? A. Yes; there must have been a couple of glasses.

Q. You have not had anything like that since then? A. No.

Q. But you have some blood come from you? A. Yes, sir.

Q. Do you recall any occasion when such a thing happened at my office, 11 Moore Street? A. Since I have been in your office?

Q. Do you recall that one particular occasion? A. Yes, sir.

Q. When was that, do you remember? A. When I arrived at first.

Q. Did you come to my office directly from the ship you came in on? A. No, sir.

Q. How long after you came here did you come to my office? A. I was roaming around on the subway; I didn't know New York, and one of the men from the ship "Coelleda," she had just arrived, took me up.

Q. He brought you over? A. And put me to bed, first.

78 Q. There is one other thing I forgot about this. How about your eyesight? Do you claim you have more trouble with your eyesight now? A. Yes.

Q. What is the matter with your eyes now? A. At times I can't see anything, just on my right eye would be blurred all the time. Blurred.

Q. When did you first notice that? A. On the day the master of the ship went ashore with me.

Q. Where was that, Azores Islands? A. Azores Islands.

Q. You didn't notice any trouble with your eyes until several days after the accident; is that it? A. No.

Q. Had you tried to read anything before that? A. I tried to read?

Q. Yes. A. Before that?

Q. Well, from the time of the accident up to the time you went ashore at the Azores? A. Yes; I tried to read.

Q. Could you read? A. I read a piece of paper there that one of the men was showing me.

Q. You had no trouble with your eyes then? A. I don't remember whether I understood what was in it or not. I looked at it, I know.

Q. Well, we want to find out if you really had any trouble with your eyes before that time or not, when you first noticed any trouble with your eyes? A. I was when I arrives in Azores Islands.

Q. Was that the first time it had occurred to you that something was the matter with your eyes? A. Well, my head was hurting, and the skin was swollen over my eyes; I thought it was because the skin was laying over my eyes.

Q. The flesh was swollen over your eyes? A. Yes, sir.

79 Q. Did that interfere with your vision then? A. Yes.

Q. Which eye? Are both eyes blind now? A. No; my right eye is much worse than my left eye.

Q. You can see quite well with your left eye? A. With my left eye I can see quite well.

Q. Did you have any trouble with your eyes before the accident? A. No.

Q. Did you ever have to wear glasses before the accident? A. No, sir.

Q. Were you ever treated by an oculist for your eyes at all? A. No, sir.

Q. You have never had any trouble with them at all? A. No, sir.

Q. Have you been treated since then for your eyes? A. Yes, sir.

Q. By whom? A. By Wells Eye Hospital.

Q. Where is that? A. Philadelphia.

Q. How long were you in there? A. Dr. Parker. I used to go there every day. You mean what he did?

Q. What did he do for you over there? A. Well, they took and put patches on, with hot water as hot as I could stand them two or three times a day, and put them over my eyes; as hot as I could stand them. Boric acid was in this hot water.

Q. How much can you see with your left eye now? That is the better one, is it not? A. My left eye.

Q. Well, you can see enough to see these pictures and point out things, can't you? A. Yes, I can do that, but the card [indicating] tells you how much, what percentage.

Q. Can you read this contract [handing to witness]?

80 Begin at the top, those big letters [indicating]. A. I can read those top letters; these letters here [indicating].

Q. What does it say? A. "United States Shipping Board, United States Shipping Board Emergency Fleet Corporation."

Q. Can you read the rest of them? A. "Agency agreement; managing and operating vessels." The rest of it I can't. I can see it but I can't read it.

Q. Put it closer to your eyes; do it any way. A. I can't, because it blurs it.

Q. You can make that out a little bit, can't you? A. Yes.

Q. But it is not so easy to read as the other? A. No.

Mr. AXTELL. All right, your witness. I thank you. I quite forgot that phase of it.

Cross-examination (continued) by Mr. LANDIS:

Q. Do you remember definitely how many days after you left Swansea this accident occurred? A. On the second or third day; second or third day.

Q. Try to recall what happened.

The COURT. You will have to speak louder. That gentleman over there [indicating] is the man who is going to decide your case; he has got to hear you.

The WITNESS. The second or third day.

Q. Now, try to remember what you did the first day. It was not the first day, was it? A. No.

Q. Can you recall what you did the first day? A. No. I can not recall.

Q. But you are sure it was not the first day? A. I am positive it was not the first day.

81 Q. What makes you think it was not the first day? A. Because it was—we were outside of the Irish Sea.

Q. Was it the second day? A. No.

Q. It was not the second day; are you sure of that? A. No.

Q. Then it was the third day? A. Third day.

Q. You are sure of that? A. I wouldn't swear it was the third day.

Q. You have sworn to it once here, but I would like to get this date definitely stated. You say here in your bill of particulars, which I take it is sworn to by you, leastwise your name is on it here, that the accident occurred—oh, no. You have it here on the fifth or sixth of March, 1926. That is the third or fourth day out, for the ship left Swansea on March 2nd. If the ship left Swansea on March 2nd, this accident occurred March 5th, is that it? A. That is, the third day after the ship left Swansea; yes.

Q. And it occurred between six and seven o'clock at night? A. Yes; between six and seven.

Q. What time does the crew have supper while the ship is on the high seas? A. I just can't hear your question.

Q. What time does the crew have supper when the ship is on the high seas? A. At five, and then the man is relieved at the wheel at five-thirty.

Q. What? A. The man is relieved at the wheel at five-thirty.

Q. The man is relieved at the wheel at five-thirty? A. Yes, sir; and he eats his supper.

Q. Do your duties as second cook require you to wash dishes and that sort of thing? A. No, sir.

Q. The mess boy does that? A. Yes, sir.

82 Q. How many weeks had you been second cook at the time of this accident, do you remember? A. Four weeks—no, three weeks.

Q. About three weeks. During this time how many times had you dumped ashes? A. In the three weeks we were there I dumped them every day, practically.

Q. Every day? A. Except skipping one day or so once in a while, I guess.

Q. What time of day did you usually dump these ashes? A. Right after supper.

Q. Always after supper? A. Always after supper.

Q. What sort of a range was in this galley? Can you describe it, the size of it? A. The range was about ten feet long, about three feet deep, big double fires; big, heavy galvanized—a big iron stove, double fires.

Q. It burned double fires? A. Double fires.

Q. What sort of coal is burned in this range? A. We had this small pea coal.

Q. Small pea coal? A. Yes.

Q. That is a hard coal, is it not? A. Well, a sort of hard coal. I don't know much about it.

Q. Where was this coal kept? A. On the shelter deck.

Q. Wasn't some of it kept in the galley? A. Yes.

Q. What? A. I remember now. There is a chute comes right from the galley down to—there is a big bin made for the coal in the galley.

Q. And it comes from the shelter deck, is that it? A. It comes from the boat deck. They must have loaded the coal—I don't remember where the coal came from. I never loaded it on the ship.

Q. Was all the coal on board the ship to be used in the galley, in the galley, do you know? A. Yes.

Q. It was all there? A. Yes.

83 Q. Do you know how much coal that was? A. We had enough coal to complete the trip, five weeks.

Q. Would you estimate it at 100 ton or 1 ton? A. I would estimate it about 10 tons was in that bin.

Q. How large a room was this galley? A. How large a room?

Q. Yes. A. It is——

Q. How long is it? A. It is about 25 feet long and about 15 feet deep.

Q. Of course, I do not suppose you know the size in cubic feet of a ton of coal, do you? A. Yes, at the beginning of the trip.

Q. No. How many cubic feet are in a ton of coal; do you know that? A. No.

Q. You are just making a wild guess when you say there were 10 tons of coal in there? A. I am not making a wild guess because the chief cook told me himself.

Q. Just a minute. It does not matter what the chief cook told you because that would not make it any the less a guess on your part, would it? You do not know how much coal was in there? A. I do. Not at the time of——

Q. How do you know? A. It was this way: I was going into the coal bunkers to get enough coal for the galley, to shove it toward the entrance where you could shovel it.

Q. In what coal bunkers are these? A. In the galley.

Q. They are all in the galley? A. Yes.

Q. Did you measure the coal at that time? A. No, the chief cook told me we had——

Q. No, it does not matter what the chief cook told you. Did you measure the coal? A. No, sir.

84 Q. You do not know how much coal was there? If I were to tell you that there was a ton there, that was probably the fact, was it not? A. If you told me a half ton at the time it was, that was right.

Q. There was just about a half ton of coal there at the time that the accident happened? A. Yes.

Q. Was there ten ton of coal on there when you left Swansea? A. Ten ton of coal from the time we left Baltimore.

Q. Oh, at the time you left Baltimore. I see. And a half a ton when you left Swansea? A. No, this was on the second day out when we had time to go into the galley—into the bunkers and do that.

Q. But how much coal was there at the time you left Swansea, do you suppose? A. Well, about a half a foot from the deck.

Q. You would estimate it a half a ton at the time that the accident occurred? A. I couldn't tell you exactly.

Q. You had not used much, had you, between the time that you left Swansea and the time that this accident occurred? A. No.

Q. Who sifted the ashes down; did you do that? A. From where?

Q. From the place where the coal burned down to the grate, through the grate down into the ash can below? A. I did.

Q. You did that. When had you done that last, previous to the time that the accident occurred? A. About the day before we left Swansea.

Q. You had not sifted the ashes since the day before you left Swansea? A. No.

Q. That is, you had not shaken them out of the place where you had the fire to the ash bin in the stove below, is that the case? A. I shook it out but I did not empty the fires. I kept them burning all night.

85 Q. Oh, yes; but you took the ashes out of the range from time to time, did you? A. Yes.

Q. In fact, you dumped those about once a day, you testified a little while ago? A. Yes, sir.

Q. When did you take the ashes out of the stove the last time prior to the accident? A. When I took them out of the stove?

Q. Yes. When did you take what ashes were left in the stove out of the stove just prior to the accident? A. I guess it was the day before.

Q. That is, you had dumped them the day before? A. Yes.

Q. Are these ashes placed in the ash can from time to time during the day, or are they always taken from the stove and placed in the ash can immediately before they are dumped? A. That ash can is also a slop bucket.

Q. Well, that does not answer my question. A. They are always shaken out after supper.

Q. They are only placed in the ash can immediately after supper? A. Yes.

Q. And you do that? A. Yes.

Q. What do you use to do it with? A. Shovel.

Q. What sort of a shovel is that? A. A small sized shovel made to fit the bunker.

Q. It is an ordinary, small range ash shovel? A. Yes, sir.

Q. That is, the range is about the same range as in the home except it is a little larger? A. It is an ordinary stove attached to the bulkhead.

Q. It is a little larger than the ordinary range in the home? A. Much larger.

Q. It only burns two fires? A. Two fires.

Q. How many shovels full of ashes did you have to take out of that range immediately prior to the accident? A. How many shovels full?

Q. Yes. A. Well, about——

86 Q. Half a dozen? A. No, took about 15 out of each side.

Q. Fifteen small shovels full out of each side? A. Yes.

Q. How large a shovel is this? You spoke of it as a small ordinary range shovel, did you not? I suppose that each of those shovels full of ashes weighed about half a pound, do they not? A. About six or seven pounds, maybe eight pounds, nine pounds.

Q. Do you mean to try to make this jury believe that an ordinary ash shovel, such a shovel as is used to take ashes out of ranges, such a shovel full of ashes weighs six or seven pounds of ashes in the shovel? A. It was no ordinary ash shovel.

Q. You just testified it was. A. It was a specially made one.

Q. Now, you are changing your testimony, Mr. Lustgarten. You realize, of course, that I was getting at the point that 250 pounds of ashes were impossible under these circumstances; is that not the case? Do you know how many tons or pounds of coal would have to be used (of course you do not) to result in a couple of hundred pounds of ashes? A. I do.

Q. How many pounds of coal would you suppose? A. How many pounds?

Q. Yes. A. About 100 pounds to make——

Q. You mean that the refuse of 100 pounds of coal would weigh more than the coal itself? A. These were ashes, they were wet down from the top.

Q. Who wetted them down when they were wet? A. I wetted them down.

Q. When did you do that? A. Just prior to taking them out.

Q. I am talking about the weight of the shovel full. A. I
87 told you it was a cut-off shovel with an ordinary handle, like a large hand shovel; had to have a specially made handle to reach all the way back into the oven.

Q. How wide a shovel was that, six inches? A. Seven inches, six or seven inches.

Q. Six or seven inches and how long, ten inches? A. About ten or twelve inches.

Q. Now, then, a shovel of that sort full of ashes would weigh seven pounds, is that what you want the jury to understand? A. Seven or eight pounds.

Q. And you took thirty such shovels full out of that stove? A. Yes.

Q. Now, make a mathematical calculation and figure out how much those ashes would weigh that you took out of there? Can you do that? A. No, sir.

Q. There were thirty shovels full, so you figure out now all told; three sevens are twenty-one, that would be 210 pounds of ashes. Of course, a pound of ashes comes from more than a pound of coal, does it not? A. Yes.

Q. You admit that it is reasonable—

Mr. AXTELL. I do not understand this. I refrained from objecting to all this testimony, going into the question of the plaintiff's knowledge of the science, and all that sort of thing; it seems to be quite immaterial and irrelevant. I object to it further——

The COURT. Objection overruled.

Q. And you had a half a ton of coal in there at the time that the accident occurred, is that the case? A. You mean in the bunker?

Q. For the use in the galley range; you testified to that, didn't you? A. In the bunker.

88 Q. That is all the coal there was there to be used for the range, isn't that so? A. That it all the coal for the range in the galley, yes.

Q. Did you take any more coal on at—well, you do not know. You were not there in Punta Delgardo when the ship sailed on.

Q. Don't you want to reconsider your testimony at this time and revise your testimony concerning how many pounds of ashes you dumped over the side of the ship? A. No, sir.

Q. Well, state again; tell the jury how many pounds of ashes there were. A. Well, I can only tell you, if I would have weighed the ashes when I dumped them out——

Q. Give us your estimate, your best guess. A. Well, my estimate was approximately 200 and maybe more, just about according to what the ash bucket holds.

Q. You testified, did you not, yesterday in this case before another judge and jury, Mr. Lustgarten? A. Yes, sir.

Q. Do you recollect what you testified the weight of the ashes you dumped was yesterday? A. No, sir; I do not.

Q. You don't recollect stating that the weight of the ashes was approximately 100 or 150 pounds? A. No, sir.

Q. You don't recollect that? A. I must have said it.

Q. You did say it. And you are swearing to this bill of particulars? A. I don't know what it is.

Q. Well, is this your signature [indicating]? A. Yes, sir.

Q. That is your signature? A. Yes, sir.

Q. You did swear to this, did you not? A. Yes, I must have; that is my signature.

Q. Can you read this? A. No, sir.

89 Q. Or is it too fine for you? A. Too fine.

Q. You can't read it.

Mr. LANDIS. You will concede that he said 250 pounds of ashes in your bill of particulars?

Mr. AXTELL. Yes.

Q. At the time you swore to this bill of particulars the amount of the ashes that you dumped was 250 pounds. Was that the case? This bill of particulars was sworn to by you on March 31st. Yesterday you reduced that to 100 to 150 pounds. Now, which is correct? A. Well, it was either between 150 and 200 pounds, may be more.

Q. And every time you dumped these ashes, each day you dumped them, the ashes weighed that much, did they not? A. Not every time I dumped them, no.

Q. How often? Was this the general rule that they weighed 200, 250 pounds? A. No; sometimes only weighed 50 pounds.

Q. Well, I suppose those were the days that you didn't cook on board the ship; is that it? A. Yes.

Q. How do you account for the variation? A. The slop was at the bottom of the ashes, made it lighter; so it was three-quarters full of garbage and a quarter full of ashes.

Q. I see. There wasn't any slop or garbage at this time, it was all ashes? A. Yes.

Q. How did you happen to wet those ashes down? A. They were still hot.

Q. So you put water on them to cool them off? A. Yes, sir.

Q. Describe this can again, will you; the ash can that you used? A. It was between two and three feet high.

90 Q. You said this morning two and a half to three feet. Now, which is correct; was it two feet or three feet or what was it? A. I didn't measure the bucket, but I just showed you where it reached on my body.

Q. Explain it and demonstrate to the jury where it reached on your body. A. To here [indicating].

Q. How tall are you? A. I guess I am about five foot seven.

Q. That is about three feet, is that it? A. Yes, I guess so.

Q. How big in diameter was it? A. A foot and a half.

Q. Are you sure it was a foot and a half in diameter? A. It was about this big around [indicating].

Q. That is more than a foot and a half around. Do you understand what I mean when I say "diameter"? A. You mean right across.

Q. Yes. As you demonstrated it there it is more than a foot and a half. A. It is?

Q. Demonstrate it again so the jury can see it. A. About this big around [indicating].

Q. That is a couple of feet.

Mr. AXTELL. No, it is not.

Mr. LANDIS. A foot and a half?

Mr. AXTELL. A foot and a half.

By the COURT:

Q. Could you get both arms around it? A. Yes, sir.

By Mr. LANDIS:

Q. Now, was this ash pail which you have just described full of ashes at the time you dumped it? A. Overflowing.

91 Q. It was overflowing. Did you spill any of them on the way over to the side of the vessel? A. I spilled plenty of them.

Q. You spilled a lot of them. You have testified, have you not, that there were not any other buckets of any sort in the galley or on the ship that you could use in dumping these ashes? A. There wasn't no bucket, small buckets in the galley there.

Q. There were buckets on the ship that you could have had, weren't there? A. Those buckets are used for the men to wash with.

Q. Well, there are other buckets besides those that the men wash with; how about those that you used to scrub up the decks with? A. The galley deck?

Q. Any decks. You have buckets on this ship, haven't you? A. We had buckets, the boatswain had them.

Q. You saw buckets when you were in A. B. there? A. Yes.

Q. Did you ever ask anybody to let you have buckets? A. I asked the chief cook.

Q. Why did you ask the chief cook? A. The big ash can was too heavy to empty at one time.

Q. I don't mean that. Who is in charge of the mess room of a ship? A. The steward.

Q. Why didn't you ask the steward? A. Deserted.

Q. There wasn't any steward on the ship? A. No, sir.

Q. What officer was in charge? There was an officer in charge, wasn't there? A. The chief cook was in charge of the galley and the stores.

Q. Wasn't the third officer placed in charge of the galley of that ship? A. No, sir.

92 Q. How about your friend Mr. Abbott, wasn't he in charge of it? A. No, sir, the captain took the food out.

Q. What? A. I say, the captain took the food out of the storeroom and put it in the locker amidships.

Q. Well, never mind that.

Mr. LANDIS. I move to strike that out. I don't think that has anything to do with the case.

The COURT. Strike it out.

Q. Now, let us get exactly what happened in that galley prior to the time that you started to dump these ashes. You took these ashes of course out of the stove and placed them in this ash can? A. Yes, sir.

Q. Did you do that of your own accord? A. The chief cook's orders.

Q. I see. Did the chief cook order you to do it every night? A. Whenever he wanted to dump them, he would order me to do it.

Q. I thought you said you did it generally at night. A. Yes, sir.

Q. He ordered you each time you did it? You did not do that in the natural course of your duties? A. During the day——

Q. You knew you were supposed to dump ashes; that was a part of your job, wasn't it? A. Well, I had never been second cook before.

Q. Didn't you tell the captain of this vessel that you were a second cook when you made application for that job? Didn't you tell Mr. O'Connor you were a second cook when you made application for that job? A. I think I did make application as second cook.

93 Q. Didn't you shown the captain a discharge as a second cook? A. You will find the discharge in that book. It is true.

Q. You showed him your discharge. I am asking you to answer yes or no. Didn't you show the captain a discharge as second cook? A. Yes, sir.

Q. Then you have been a second cook and you knew the duties of a second cook? A. I knew my duties.

Q. You had been working three weeks as a second cook, hadn't you? A. Yes; I had been working three weeks.

Q. Let alone the job you had had before as second cook? A. I had the same kind of a job coming in on the "Westpool."

Q. It doesn't matter; you had a second cook's job before or you would not have had a discharge as second cook. You knew you were supposed to dump ashes as a part of your regular duties as second cook? A. Yes, sir.

Q. And you mean to say that the chief cook told you every time you had to dump ashes? A. He did.

Q. And that you didn't do it in the ordinary course of your duties? A. No, sir.

Q. Did he order you to make every move you made? A. No, sir.

Q. You did your job as you should do it in any ship, of course, as a good second cook, didn't you? A. He wrote down what stuff he wanted me to do and then if he wanted something extra done, why, he would ask me.

Q. Did he order you to dump ashes the first time that you assumed the duty of second cook? A. Yes.

Q. Did he order you to dump the ashes the second time? A. Yes.

Q. Did he order you to dump the ashes the third time? A. Yes.

94 Q. Did he order you to dump the ashes the fourth day? A. Yes.

Q. Did he order you to dump the ashes the fifth day? A. Yes.

Q. Did he order you to dump the ashes the sixth day? A. Yes.

Q. And every day? A. Yes.

Q. You never undertook voluntarily to dump the ashes without his order? A. I was under his order, and whatever he told me to do I did.

By the COURT:

Q. You didn't do anything else except what he told you? A. Not only—as a matter of fact, in taking care of the stove, he wouldn't let anybody touch his stove; he wouldn't let anybody—unless he wanted them to touch it. He wouldn't let anybody interfere with the heat when he was cooking.

By Mr. LANDIS:

Q. That hasn't anything to do with dumping ashes. You know very well, Mr. Lustgarten, that you did not await his orders to dump ashes; you did it as a matter of course, as part of pour regular duties, you took those ashes and dumped them over the side of the ship, didn't you? A. At his orders; yes, sir.

Q. And he ordered you every time that you dumped ashes, to dump ashes, and you never dumped them unless he ordered you to dump them, is that what you want the jury to believe? A. Yes, sir.

Q. Why did you do that? Why didn't you voluntarily dump ashes as any ordinary second cook would? A. Because he told me to absolutely leave his stove alone.

95 Q. But this particular ash can; was that a part of his stove? A. No.

Q. Were you on board that ship while the steward was on board her? A. No, sir.

Q. You were not on board? A. I was on board the ship.

Q. But you were not second cook at that time? A. No, sir.

By the COURT:

Q. When did you put these ashes in this can before you dumped them on the day of the accident? A. What time?

Q. When. A. Between six and seven, after supper.

Q. So the entire accumulation of ashes which you attempted to dump over the side was placed by you personally in the can after your orders from the cook? A. Yes, sir.

By Mr. LANDIS:

Q. Have you ever spoken to any officer about this one ash can you had in the vessel and ask to have something else, so that you might have an easier job to dump ashes? A. No, sir.

Q. Why didn't you do that? A. I asked the cook.

Q. Well, why didn't you ask an officer? The cook is not an officer on board that ship, is he? A. He was my boss.

Q. He is not an officer on board that ship, is he? A. I was under his orders.

By the COURT:

Q. How heavy was this can when it was empty? A. When it was empty?

96 Q. Yes. A. It was about 15 or 20 pounds.

Q. You had no difficulty with it then, did you? A. No, sir.

By Mr. LANDIS:

Q. You could have talked to an officer; there wasn't any law against your going up——

The COURT. I do not think it is necessary to go further into that.

Mr. LANDIS. Sir?

The COURT. I do not think it is necessary to go further into that.

Mr. LANDIS. I want to get it established, if your honor please, that there were pails on board that ship and he could have had them if he had made any request.

The COURT: Come up to the desk.

(Counsel and court confer.)

By Mr. LANDIS:

Q. Well, now, did you testify that when you got out to the place where the accident occurred—what did you first do after you got out there? A. Out of the hospital?

Q. No; after you got out where the accident occurred with the can of ashes that you were about to dump? A. You mean the way I dumped the ashes?

Q. Yes. What did you do first, what was your first—you got the ash can up alongside of the rail, now what did you do? A. I tilted it over the second rail.

Q. Did you first put your foot through the rail? A. First put my foot through the rail.

Q. Do you know how high that rail is? A. I do.

97 Q. How high? A. About that high [indicating].

Q. No, the rail you put your foot through? A. What did you say?

Q. The rail you put your foot through, how high is that? A. That is about that high [indicating].

Q. That high from the deck where you were standing? A. Yes, sir.

Q. And there was a rail just about 21 inches above it, wasn't there? A. Yes.

Q. When you got your foot through there you were sort of leaning backward, weren't you? A. Leaning right up against the rail.

Q. Now, then in that position you lifted this ash can weighing 200 pounds up to the top rail of the vessel, is that the case? A. I tilted it up.

Q. How did you tilt it up? A. I swung it forward on the side and I slid it up on the bulkhead.

Q. What bulkhead? A. The bulkhead.

Q. You mean alongside of the house there? A. Yes, sir.

Q. How could you slide up alongside of the house? A. Can I describe it to you here?

Q. Yes. A. Put my foot through here [indicating], and I tilted the bucket over this way, and put my foot—

Q. You could not have leaned that way, could you? This thing here [indicating] is quite aways away from where you were standing, isn't it? A. This way [indicating].

Q. That is not quite the position? A. That is the position [indicating].

Q. You got braced on this side of the vessel, is that it? A. With my foot down through here and I pulled the bucket over, just reached it over that way, and bent over, and I took it and just slide it over and lift it right up.

98 Q. You lifted this 250 pounds how high, four feet? A. That high [indicating].

Q. Three and a half feet? A. I just remember the part of my body that touched it.

Q. All right. Get back on the stand. Now, what sort of water hit you? You testified today that it was a spray. Is that what it was? A. Heavy spray.

Q. You testified yesterday you didn't know what it was, whether it was spray or whether it was a wave? A. I said spray.

Q. Do you remember verifying the complaint in this action? A. I do.

Q. Is this a copy of the complaint which you verified? A. It must be.

Mr. LANDIS. You will concede that it is, won't you, Mr. Axtell? This is the copy of the complaint that he verified?

Mr. AXTELL. Yes.

Q. You remember stating in here that a heavy green sea suddenly came forward aboard the ship. Do you mean there that it was

merely a spray, or did you mean a heavy green sea? A. A heavy green sea.

Q. A heavy green sea that came over? A. We call that a sea.

Q. Mr. Flynn, whose testimony has been take in your behalf, has testified, has he not—but you have not seen his deposition? A. I have not seen his deposition, no.

Q. Well, I will withdraw that question. Now, what sort of spray was this? A. Very heavy spray.

Q. What do you mean by "heavy spray"? A. Heavy spray, I couldn't describe it to you.

Q. Was it solid water? A. Not solid water, no.

99 Q. It was like the top of a wave when it strikes the side of the ship? A. Yes.

Q. Where did that wave come from, do you know? Did it come running alongside of the vessel or did it come straight over? A. Well, it took me by surprise, and I don't know whether it come over the side of the ship or whether it came from the offshore side in.

Q. Do you know whether anybody saw this accident? A. There was a whole—there was quite a few around the galley because I had to make a run of it to get across the deck.

Q. Did Mr. Dubrusky see this accident? A. I presume he did.

Q. Did Mr. Flynn see it? A. I guess he did.

Q. Did any of the officers see it? A. I don't think so; I don't know.

Q. Didn't you tell the consul out in the Azores that Mr. Abbott had seen it? A. I don't remember saying that.

Q. You remember making an affidavit out there, do you not? A. Yes, sir; I made one.

Q. Is that your signature [indicating]? A. It must be.

Q. You are able to see that, aren't you? A. Yes, sir.

Mr. LANDIS. You will concede that here it states——

Mr. AXTELL. Why don't you offer it in evidence?

Mr. LANDIS. I don't want it in evidence yet.

Mr. AXTELL. Well, I will object to it if you do not put it in evidence?

Mr. LANDIS. He has already admitted his signature, if your honor please.

100 The COURT. That is enough.

Mr. AXTELL. Put it in evidence; put the whole thing in.

Mr. LANDIS. I will in due course, but I do not want it now. However, I will pass that for the moment.

Mr. AXTELL. I ask that it be marked for identification.

The COURT. It may be marked for identification.

Mr. AXTELL. I offer it in evidence.

Mr. LANDIS. Why, if your honor please——

The COURT. It may be marked for identification. You may have it marked in evidence at another time.

(Marked "Plaintiff's Exhibit 9 for Identification.")

Q. Do you remember how many people you passed on the way from the galley to the ship's side? Were any between the galley and the ship's side; did you have to pass any of them? A. No.

Q. You did not have to pass anybody? A. No.

Q. You had a clear passageway? A. Yes.

Q. Now, speak up a little louder, Mr. Lustgarten. A. I had a clear passageway.

Q. You don't recollect from what direction that water came that struck you? A. I couldn't tell.

Q. Did it strike you at all before it struck the pail? A. I couldn't tell you.

Q. You don't remember whether it struck you or struck the pail first? A. I don't remember.

Q. But you remember the pail striking you? A. I could feel it; yes.

Q. Where did the pail strike you? A. First on the head.

101 Q. Where was your head in relation to that pail prior to the time the water hit it; was it back of it or was it just alongside of it. A. Just alongside of it.

Q. Now, I take it that the back end of the pail hit your head, is that true? A. I don't know whether it was the back or whether it was the front. I know the pail hit my head.

Q. Did you receive any scars or anything from this pail hitting you on the head? A. Yes, sir.

Q. How long did you carry those scars? A. Until I got back to New York.

Q. You lost them when you got back here, or after you got back here? A. I still carry them.

Q. No; that is no scar. If it is a scar, was there anything more than that that you carried, or how long did you carry it? Was there any gash, for instance? A. You mean the skin broken?

Q. Yes. A. No, not that I remember of.

Q. It did not break at all? A. No.

Q. Were you burned? A. Yes.

Q. What burned you? A. My back. I don't know what burned me. I presume it was the ashes.

Q. You had wet those ashes down before you started to dump them, had you not? A. Yes, sir.

Q. How had those ashes remained hot when you had wetted them before you took them out to dump them? A. I don't know why they remained hot.

Q. What happened, did you receive blisters from these burns? A. Yes.

Q. How long did you carry those blisters? A. I don't know how long I carried those blisters.

Q. They were there while you were on the ship? A. While I was on the ship; yes, sir.

Q. Were you able to lay on your back? A They were broke the very next morning.

102 Q. You were able to lay on your back comfortably? A. I wasn't comfortable. I don't know as——

By the COURT:

Q. Were you able to lie on your back? A. I don't know whether I was lying on my back or my side.

Q. Don't you know whether you were able to lie on your back? A. No, sir; I don't think I was.

Q. Don't you know?

By Mr. LANDIS:

Q. As a matter of fact, Mr. Lustgarten, you didn't have any blisters on your back at all, did you? A. I did.

Q. That is not the fact, is it? You were not burned? A. I did.

Q. Those ashes were not hot; they had been wetted and they could not have been hot. The water came up over them anyway and would have wetted the ashes if you had not wetted them before, isn't that true? You were not burned? A. These ashes would steam anyway, I guess.

By the COURT:

Q. Your underclothing that you had on was still wet, was that burned? A. Judge, I don't know what became of my clothes.

Q. You said when you came to in the hospital you had wet underclothing on. Was that burned? A. It was not underclothing, it was pants.

Q. Just the pants? A. Yes, sir.

Q. Is that all you had on? A. That is all.

103 By Mr. LANDIS:

Q. Probably your clothes were all burned up. Is that probably the case? A. (No answer.)

Q. Did you ever get your clothes back? A. I never got back my clothes. That is why I say that somebody took them.

Q. Who was there when you returned to consciousness; who was in the hospital? A. Mr. Abbott.

Q. Is that all? A. I don't remember if there was anybody else in there.

Q. Who is Mr. Abbott? A. The second officer.

Q. Did you ever have any conversation with any of the other officers other than Mr. Abbott concerning this accident? A. Except the master of the ship.

Q. Have you ever had any conversation with Mr. O'Connor? A. No.

Q. Possibly you just don't remember talking to Mr. O'Connor? A. No; I had no conversation with Mr. O'Connor.

Q. Did you ever have any conversation with Mr. Cox, the third officer? A. No, sir.

Q. The only man you really had any conversation with or anything to do with you was Mr. Abbott? A. Yes, sir.

Q. What did Mr. Abbott do for you when you returned to consciousness? A. Well, I told you he put some vaseline or something of that sort on me, and gave me a dose of Epsom salts.

Q. Then he put you in bed and left you there? A. I was already in bed.

Q. What? A. I was already in bed.

Q. But he left you in bed and went on his way? A. Yes, sir.

104 Q. When did you first see the captain after the accident; how many days afterwards? A. I don't know how many days it was.

Q. You have testified on direct examination it was the third day afterwards, didn't you? A. I think it was the very next day.

Q. The very next day? A. Yes, sir.

Q. Was anybody present when you had this conversation with the captain? A. Yes, sir.

Q. Who was present? A. There was another man in the hospital.

Q. Do you know his name? A. Yes, he was Thomason.

Q. Were any of the officers there? A. When I returned to consciousness?

Q. No, when you had that conversation with the captain. A. No, sir.

Q. There were not? A. No, sir.

Q. What took place when you and Mr. Abbott went up on the bridge of the vessel and talked to the captain on the birdge? A. What do you mean; what conversation took place?

Q. Yes, what conversation took place? A. Mr. Abbott told the captain I was sick.

Q. And the captain then took you off duty, didn't he? A. That night; yes, sir.

Q. How many days did you work all told after the alleged accident? A. Oh, for about—in the mess room about two hours.

Q. Only two hours all told? A. That is all.

Q. Was this the only time that you, Mr. Abbott, and the captain were together that time on the bridge? A. Yes, sir.

Q. Have you given the whole conversation that took place at that time between you? A. Yes, I remember the captain saying when he told him I was coughing up blood, spitting blood, he said, well, "I guess he has got tuberculosis."

105 Q. There wasn't anything else that was said by the captain in your presence and in the presence of Mr. Abbott? A. No, sir.

Mr. LANDIS. Now, then, I am ready to offer this in evidence——

Mr. AXTELL. No objection.

The COURT. What is the purpose of that?

Mr. LANDIS. Admission against interest, to show this man up as having made statements under oath which are contradictory of the statements he is making at this time on the stand.

The COURT. It may go in.

(Marked "Defendant's Exhibit A.")

The COURT. If it is offered for the purpose of contradiction of the witness, he is entitled to be confronted with it.

Mr. LANDIS. He can not read it.

The COURT. If it is offered for an admission it may be received, if there is no objection.

Mr. LANDIS. Well, I have not offered it as an admission but the admission is in the nature of a contradiction of what he is saying now.

The COURT. Then he is entitled to be confronted with it.

Mr. LANDIS. Then I will read it to him. This letter [indicating] is a letter from the consul to us.

Mr. AXTELL. The affidavit is in evidence; do you want to question him on it?

Mr. LANDIS. Yes.

Mr. AXTELL. Go ahead.

106 Q. Then there was no such conversation between Mr. Abbott and the captain of this vessel in your presence as is stated in this affidavit, which reads as follows:

"The captain"——

Mr. AXTELL. I suggest that counsel read the whole affidavit. It is in evidence.

The COURT. He need not do so. Objection overruled.

Mr. LANDIS. "The captain kept on saying, 'Give him another dose of salts,' and Mr. Abbott, the second officer, said, 'Captain, you will kill him if you give him more Epsom salts.' The captain says 'That is what I want to do.'"

Q. That was not said, was it? A. You refresh my memory on it now.

Q. When was that said? A. On the day that he took me up to the bridge.

Q. How did he happen to say that? A. How did he happen——

Q. Yes. A. He didn't have no use for the whole crew.

Q. Well, that does not matter. How did he happen to say that? What was the conversation leading up to it? A. I couldn't tell distinctly every word he said.

Q. You have done pretty well so far, Mr. Lustgarten. Now just keep on with this. A. I couldn't tell you just word for word unless I was reminded.

Q. That took place on the bridge, did it? A. On the bridge, yes, sir.

Q. Did you ever see the captain any place else but on the bridge? A. After the accident?

Q. Yes. A. When I was in the hospital.

Q. You saw him in the hospital? A. Yes, sir.

107 Q. Are those the only two times you saw the captain, the time when you saw him in the hospital when he told you to go to work, and the time he relieved you from duty? A. And I seen him passing by to go back aft once.

Q. You saw him passing by? A. Yes.

Q. Did you have any conversation with him at that time? A. No, I did not.

Q. When did you have your first attack of blood flowing out of your nose and mouth, the day that you were put to work? A. Yes.

Q. How many attacks did you have on that day? A. Two or three attacks that day.

Q. You did not have any more than two or three attacks that day? A. I don't remember them.

Q. This affidavit said you had five attacks. Did you have that many? A. Did I swear to that?

Q. You swore to it? A. I guess I did.

Q. You didn't remember much more about it than you do now? You didn't remember better then than you do now how many attacks you had? A. Yes, I do. The American consul asked me to go to the hospital physician.

Q. How many attacks did you have this day that you were made to work? That has nothing to do with Punta Delgardo. How many attacks have you had within the last week? A. This last week?

Q. Yes. A. Coughing up blood?

Q. Yes. A. Every day.

Q. What time of day does it usually happen? A. You mean coughing? Well, I coughed blood a few minutes ago, just prior to coming in here.

Q. Standing in the hall? A. No; after I had dinner.

Q. Are you able to run up the stairs, Mr. Lustgarten, without glasses, for instance? A. To run up——

108 Q. Yes. A. No, sir.

Q. Have you ever done that? A. After the accident?

Q. No; have you done it within the last few weeks, the last month or two? A. Run?

Q. Can you do it? A. You mean run or just run up the stairs?

Q. Yes; run up the stairs. A. I don't think so.

Q. You can't do it? A. I don't think so.

Q. You know whether you can. Have you done it. A. I have not done it.

Q. You haven't done it at your cousin's house in Brooklyn? A. No, sir.

Q. You didn't do it after you received a special delivery letter, run up in your underclothes without your glasses? A. Where was that?

Q. At your cousin's house in Brooklyn about a month and a half ago? A. No.

Q. Are you able to get off the street cars and get across the street in pretty good shape? A. Yes, sir.

Q. Can you do that? A. Yes.

Q. And you can see pictures easy enough, can't you? A. Yes, sir.

Q. Have you ever had any treatment in the New York Eye and Ear Hospital? A. Yes, sir.

Q. How long were you treated there? A. Well, I don't remember the dates.

Q. You were only treated for a day or two; you went in for an examination? A. Three or four times.

Q. What? A. I guess I went in three or four times.

Q. You were an out-patient? A. Patient from the Staten Island Hospital.

Q. Were you ever in the Brooklyn Eye and Ear Hospital? A. Yes; Mr. Axtell took me over there.

109 Q. How long ago were you over there? A. I don't know; I don't remember.

Q. Have you ever been treated by any other eye doctor either on your own account or that Mr. Axtell has sent you to? A. I have seen so many doctors I can't remember the names.

A JUROR. A little louder.

The COURT. That did not call for names. The question was whether you have ever been to any other eye doctor.

The WITNESS. Yes, to the eye doctor that you sent out.

Q. I am speaking on your own account or that Mr. Axtell sent you to? A. To the Wells Eye Hospital.

Q. In Philadelphia? A. Dr. Carhart from New York.

Q. Dr. Carhart. Is he an eye specialist? A. Yes.

Q. Anybody else? A. Dr. Powers.

Q. Is Dr. Powers an eye specialist? A. Yes, sir.

Q. Anybody else? A. I don't think so.

Q. Now how many hospitals have you been in in which your chest has been examined and samples of your sputum taken? A. Oh—

Q. Can you say? You have been in the Post-Graduate, it was done there? A. Yes, sir.

Q. You were in Kings County, it was done there? A. Yes, sir.

Q. Have you ever been in any other hospitals that you know of where they took your sputum or made an examination of your chest? A. Staten Island Hospital.

Q. Any others? A. No.

110 Q. Have you ever been to any doctors on your own account, or at Mr. Axtell's suggestion, for an examination of your lungs, or your chest where your sputum has been taken or X rays have been made of your chest? A. Dr. Powers.

Q. Did Dr. Powers take an X ray of your chest? A. Yes.

Q. He is the only one? A. Yes.

Q. That is, except the doctors which I have—— A. There has been another X-ray laboratory. I went up to that place you sent me to.

Q. Yes; but nobody that Mr. Axtell has sent you to, or you have had on your own account, except Dr. Powers that you remember? A. Dr. Powers and another place.

Q. Up in the Times Building? A. I think so.

Q. Those are the only two? A. Yes.

Q. And they were both X rays. Did either of those places take samples of your sputum? A. Dr. Powers took samples of my sputum.

Q. Anybody else? A. No.

Q. How many samples did Dr. Powers take of your sputum? A. One sample.

Q. Just one sample. When was this? He has made various examinations of you, hasn't he? A. Five or six times.

Q. When was this sputum taken? A. I don't remember.

Q. Was it recently? A. Recently, about a month ago.

Q. About a month ago. He never took any before that? A. No, sir.

Q. When were these X rays taken by Dr. Powers; recently? A. Some were taken last month, some were taken—no, this—yes, last month. Some were taken last year.

Q. What was this X ray of, your chest? A. X ray of the chest.

111 Q. Was an X ray of the chest? A. Yes.

Q. In both cases? A. He X rayed the whole part of me; he X rayed my head.

Q. He X rayed you head last year, didn't he? A. Yes.

Q. And this year he has X rayed your chest? A. Yes, chest.

Q. Those are all the X rays you remember being made by Dr. Powers? A. Had one taken in Azores Islands, too.

Q. Yes. Did you ever ask the captain to go to a hospital, the captain of the "Coelleda" to go to a hospital? A. Yes.

Q. Did he let you go to the hospital? A. No, he said "No."

Q. He did not let you go to the hospital in the Azores Islands? A. To see if I should go to the hospital.

Q. What? A. Wanted to see if I should go to the hospital.

Q. Well, he permitted you to be paid off in the Azores so you might have medical treatment there, didn't he? A. Yes.

Q. You admit that. Mr. Abbott gave you the medical treatment on board the ship, did he not? A. Yes.

Q. No complaint in that direction, was there? A. (No answer.)

Q. The only complaint you have about the treatment you received after the alleged accident happened was that the captain made you work for a period of a couple of hours, is that true? A. Yes, sir.

Q. Did you ever sail in the "President Harrison"? A. No, sir.

Q. Did you ever sail on any Grace Line ships? A. No, sir.

112 Q. Have you ever sailed in the Atlantic Ocean prior to your voyage on the "Coelleda"? A. Yes, sir.

Q. You have been around in the Pacific, have you not? A. Yes, sir.

Q. Between what years were you around in the Pacific? A. 1922 and 1923.

Q. Those two years? A. And 1924.

Q. 1924? A. I don't know that positive.

Q. Did you say that you had sailed on any Grace Line ships during that period? A. Grace Line.

Q. Out of New York or around the coast? A. Grace Line?

Q. Yes, W. R. Grace. A. No, sir.

By the COURT:

Q. Answer whether you have ever sailed on a Grace Line ship? A. No, sir.

By Mr. LANDIS:

Q. Now, isn't it true, Mr. Lustgarten, that you told Mr. O'Connor that you wanted to be made second cook because you had had an accident a year before which had impaired your health and made the work of an A. B. rather difficult; isn't that true? A. I never told Mr. O'Connor anything of the kind.

Q. You did have such an accident, did you not? A. I never had any accident prior to this one that I can recall just now.

Q. Well, you qualify it? A. I never told Mr. O'Connor anything of the kind.

Q. You never told Mr. Abbott that either? A. I never told Mr. Abbott that either.

113 Q. Did you ever have any illness on board any ship that you had sailed on prior to the "Coelleda"? A. No, sir, I haven't been sick on any ship.

Q. When did you first go to sea? A. The late part of 1922.

Q. How old were you then? A. I guess I was about fourteen.

Q. What did you sail as on that voyage? A. I sailed as—I was a work-a-way on the "Jacob Luckenbach."

Q. That sailed to the Pacific, did it not? A. Pacific coast, yes.

Q. Had you ever run away from home before that? A. No, sir.

Q. Didn't you run away from home when you were twelve years of age? A. No, sir.

Q. Your sister was mistaken about your running away from home at twelve years of age? A. No, sir. When I was twelve years of age—when I was twelve years of age I was in Atlantic City in school.

Q. What grade did you reach in school? A. I was in the seventh grade at the time.

Q. Did you ever claim to have taken a course in a pharmaceutical college in Philadelphia? A. Intentions.

Q. You claimed to have really been there? A. I claimed.

Q. You admit asking for the second cook's job, don't you? A. No, I don't.

Q. Wouldn't it be better to have a job paying $80 a month than a job paying $62.50? A. Yes, it would.

Q. Or $65, whatever it may have been. You wanted to get it of course? A. I didn't ask for the job.

Q. The captain is lying? A. No, the chief cook went in and told the captain that I had a second cook's discharge.

114 Q. The captain says you asked him for the job. A. I never done anything of the kind.

Q. Did you ask to be placed back doing deck work after you were relieved from the cook's job because of your illness? A. No.

Q. Didn't you ask Mr. O'Connor to let you do deck work? A. When I was ill?

Q. After you were relieved from the cook's job, because you had been spitting blood, or the captain thought may be you had? A. I asked O'Connor to go to work on deck?

Q. You did that, didn't you? A. Not that I recall.

Q. The first hospital you entered here was the Marine Hospital over in Staten Island, was that not true? A. Yes, sir.

Q. You asked for your discharge over in the Marine Hospital at Staten Island, did you not? You asked to be discharged from there, did you not? A. From Staten Island Hospital?

Q. Yes. A. I asked to be discharged?

Q. You asked for your discharge from this Marine Hospital in Staten Island? A. The nurse came up and told me at Staten Island.

Q. Answer my question. Did you or did you not? A. I never asked for no discharge from Staten Island.

Q. If the records show it the records are mistaken, is that true? A. The doctor was sick at the time I was discharged.

Q. Do you know what the doctor's name was? A. No, I don't remember his name.

Q. Was it Dr. MacPeck? A. Dr. MacPeck.

Q. He was ill at the time of your discharge? A. Ill at the time of my discharge.

Q. The records are lying when they show that you asked for your discharge?

115 Mr. AXTELL. I object on the ground that the records do not talk.

The COURT. That is not a proper question. Objection sustained. You can not ask the witness to characterize documents that are not in evidence.

Mr. LANDIS. I will withdraw the question.

Q. Did you tell whoever took your history at the Marine Hospital that you were struck by a heavy sea? A. I believe so.

Q. Then you were not struck by spray after all, you were struck by a heavy sea? A. I will tell you, from the time of the accident until the present time, when I was really ill, there have been so many people asking me questions that I can't remember who they all were or just how——

Q. You remember better now what occurred on that particular day than at any other time, is that true? A. I remember better now.

Q. You were not struck by a heavy sea, although you may have said so at that time, which was about a month and a half after the accident occurred? A. I guess so.

Q. Do you remember swearing in the complaint that you were knocked against the rail? A. Yes.

Q. How did you happen to do that? You have not testified that you were knocked against the rail; you testified that you do not

know what happened to you after this bucket came up against your head? A. I was against the rail at the time.

Q. How did you happen to swear to that fact? A. The bucket went down on me, jammed my chest and head right up against the rail.

Q. The bucket was over your head, is that it? A. Yes, it was over my head.

116 Q. I thought your head was alongside of the bucket? A. Over here [indicating].

Q. I thought your head was alongside of the bucket? A. Well, when I—it seems as if I must have bent my head a little bit looking down and then it went over.

By the COURT:

Q. You did not have it on your head, did you? A. No, sir.

Q. You had it in front of you? A. Right on the side of me.

Q. As you lifted it to put it over the rail it was between you and the rail, was it not? A. It was half over the rail, half over the side of the ship and half over me.

Q. Then how could it hit you in the back? A. The water just threw it up.

Q. You mean the water hit you or the bucket hit you? A. The bucket hit me.

Q. In the back? A. Just hit me on the side of the head and rolled right off my back.

Q. Did you fall down? A. Yes, sir.

Q. Did you fall down with it in your arms? A. No! I didn't have it in my arms.

Q. How did it come that you stated in your complaint the sea struck you on the back and rolled your chest with great force against the rail of the vessel? A. The bucket was coming up, was lying right on my head and back. That is why I surmised it, because——

Q. That is your only explanation? A. The only explanation I have.

117 By Mr. LANDIS:

Q. You testified a little differently yesterday, did you not, Mr. Lustgarten? A. I don't know.

Q. What rail did your chest strike, if you remember; the top rail? A. Top rail, I guess.

Q. Yesterday you testified it was the bottom rail that your chest struck, did you not? A. I did not.

Q. This is your testimony, is it not? A. That is my testimony.

Mr. LANDIS. Now, may I read this, your honor?

The COURT. Yes.

Q. You testified to this, did you not, yesterday:

"Q. How heavy was it? A. Approximately 150 pounds.

"Q. Speak up. A. It was approximately between 100 and 150 pounds.

"Q. Between 100 and 150? A. Yes, sir.

"Q. That is with ashes in it? A. Yes, sir, with the ashes.
"Q. Who put those ashes in there? A. I put them in.
"Q. When this sea struck you what happened to the bucket and you? A. Well, the bucket went down on my head and chest.
"Q. Louder, please; I can not hear you. A. As soon as the bucket dropped it hit practically on my head and chest, bumping my head and chest right against the rail of the vessel.
"Q. And you went on this rail below, is that it? A. Yes, sir.
"Q. Where was the bucket in reference to you? Did it come down on your back? A. Right on my back, yes.
118 "Q. What part of it struck your back? A. I do not know how the bucket struck."
Q. You testified to that yesterday, didn't you? A. I testified——
Q. You testified to what I read, did you not? A. Yes, sir.
Q. Your memory was much clearer yesterday than it is to-day as to how that happened? A. No, it is not. It is just the same.
Q. You testified a little while ago you didn't remember anything after that bucket hit you in the face? A. I don't remember anything.
Q. This time you said the bucket hit you in the back? A. It did.
Q. How could it hit your face? You say you didn't remember anything. It hit you in the back first? A. Well, I could feel the bucket when it came down on me.
Q. When did your father die, Mr. Lustgarten? A. About seven or eight years ago.
Q. Do you remember what year? A. No, I don't.
Q. What was your father's trade? A. Dyer.
Q. He was never a druggist, was he? A. No, sir.
Q. You have said at different times that he was a druggist, have you not? A. A druggist?
Q. Yes. A. I have a brother who is a druggist.
Q. You have told that he was a druggist, and you have told people that your brother was a physician. You have a tendency to lie, haven't you, Mr. Lustgarten?
Mr. AXTELL. What is that?
Mr. LANDIS. I withdraw the question.
Q. You don't remember when your father died. Do you remember what he died of? A. Yes, sir.
Q. What did he die of? A. Heart trouble.
119 Q. He did not die in an automobile accident, did he? A. No.
Q. You have stated that he did die in an automobile accident, haven't you? A. I stated he died in an automobile accident?
Q. Answer my question? A. No; I did not.
Q. You never have. When did your mother die? A. Four or five months before my father.
Q. What was your mother's name? A. Sir?
Q. First name? A. Mary Lustgarten.
Q. Where was she born? A. I don't know.
Mr. AXTELL. I object.

Q. She was born in Austria, wasn't she? A. No.

Mr. AXTELL. I object to that. It is immaterial. How can he know?

Mr. LANDIS. He knows by hearsay.

The COURT. He says he does not know.

Q. Do you know where your mother died? A. Yes.

Mr. LANDIS. That is all.

Redirect examination by Mr. AXTELL:

Q. At the time you were told to dump these ashes by the cook, will you explain just exactly what orders you received, or what conversation you had, and what you did before or after with reference to the ashes in a chronological order; that is, the order of time? A. The time? You mean the time, say, five minutes or ten minutes, something like that?

Q. Well, you finished some of the work on the day——

120 By the COURT:

Q. You had your supper and you had this conversation about the ashes. Now, tell us from the time you were first spoken to about the ashes what was said by you or by anybody else in your presence and what you did. Now, tell it yourself without any interruption. Go ahead and tell this jury. A. You mean about the chief cook ordering me to take the ashes out?

Q. Everything that happened until you got hit. A. I went into the galley; the chief cook was in there eating supper, and I was just about to sit down and eat mine and the chief cook says to take the ashes out and dump them overboard. I asked him to give me a hand into dumping these ashes and he said, "You can dump them yourself," and I started to argue with him, so he says, "Well, if you don't dump them I am going to tell the captain and put you where we got one other one there.

So I didn't want to start any more trouble; I took the ashes and dragged them across the deck, got them as high as the rail——

Q. Now, one moment. Let me interrupt you there. A moment ago you told me very definitely that after you received these orders you, yourself, filled the bucket? A. Yes, I told you that.

Q. Now, put that in if it is true. You are skipping something. A. I filled the bucket.

By Mr. AXTELL:

Q. This witness started in here by saying the ashes were there. When you had this conversation in the galley, where were the ashes, in the stove or in the bucket? A. Part of them was in the stove and part still in the bucket.

121 Q. You had already started to do the work? A. I had already started, and I finished up.

Mr. AXTELL. That is all.

By the COURT:

Q. Whatever ashes were in that bucket you placed there yourself? A. Only the ashes that remained outside of the stove——

Q. Whatever ashes were in that bucket you put in that bucket, is that correct or not? A. Yes, sir.

Mr. LANDIS. I have just one or two more questions.

Recross-examination by Mr. LANDIS:

Q. Did you ask anybody to assist you with that bucket other than the chief cook? A. No, sir.

Q. You never made a request of those who were standing around to assist you? A. No, sir.

Q. Why didn't you do that? A. They wouldn't do it anyway.

Mr. LANDIS. Now I move that that be stricken out. The witness does not know what they would do.

The COURT. I assume he thought so and acted upon it accordingly. It is responsive to the question. You left the door wide open.

Q. The quarrel that you had with the cook at this time was mainly a matter of when those ashes were going to be dumped; you were intending to dump the ashes sooner or later, were you not? A. Yes.

Q. You would have dumped them of your own accord, even
122 though he did not order you to, if you didn't do that at that particular time? A. (No answer.)

Q. You would not have ever dumped those ashes if he had not ordered you to? A. I wouldn't have dumped them. I would have dumped them on his orders; yes.

Q. You would have left them in that galley standing there day after day until he had ordered you to dump them? A. That is something I don't know. I don't know what I would have done. I would have dumped them, though.

Q. Your fight which you had with the cook at that particular time was mainly that you wanted to eat your supper and he wanted you to dump the ashes; that is true; isn't it? A. Yes.

Q. That was the nature of the order he gave you? A. Yes.

Mr. LANDIS. That is all.

Mr. AXTELL. I will read the deposition of Frank Voogd, taken the 16th of November, 1926. This is a deposition taken before the trial of the action of a witness, a member of the crew, before he had gone away [reading]:

Direct examination by Mr. AXTELL:

"Q. Were you a sailor on the SS. 'Coelleda'? A. Yes.

"Q. At the time a man by the name of Lustgarten was employed on her? A. Yes.

"Q. Are you a seaman? A. Yes.

"Q. Do you expect to go to sea again soon? A. Yes.

"Q. Do you know when it was when you were on this vessel? A. It was on a voyage from January to the 5th of April.

123 "Q. January to April, when? A. 1926.
"Q. What was your work? A. A. S.
"Q. What was Lustgarten? A. A. B. or ordinary A. S.
"Q. Do you know anything about the accident?"

Mr. LANDIS. If your honor please, I object to the use of that word "accident" until it is shown this man saw the accident. As a matter of fact, he did not.

The COURT. I think you may skip to the third page. He says he saw him at nighttime.

Mr. AXTELL. Yes; I will do that. [Continuing reading:]

"Q. Did you see him the day of the accident? A. Yes.
"Q. Before or after? A. After.
"Q. Where? A. In his room.
"Q. At what time. A. Nighttime.
"Q. Do you know how long before you saw him he was supposed to have been hurt? A. What? No; I don't.
"Q. What time did you first hear about it? A. Nighttime, he was telling me about it.
"Q. Describe his appearance and general condition when you saw him? A. He was looking pretty pale, and he had hemorrhages, like puking blood.
"Q. You saw blood coming from where? A. His mouth; he was very sick.
"Q. You said hemorrhages didn't you? A. Spitting blood.
"Q. You said puking it. A. Very little that night.
"Q. Had you ever seen any blood coming any time before that? A. No.

124 "Q. Was it on way to United States or England? A. United States.
"Q. From what port had she just sailed? A. Swansea.
"Q. How many days out was she? A. Three days.
"Q. Did you see him again during the voyage, after this time? A. Yes.
"Q. How many times? A. Several times a day.
"Q. Did he complete the voyage? A. Yes.
"Q. On that ship? A. He got paid off in the Azores.
"Q. How many days after the accident? A. Approximately 11 or 12 days.
"Q. How long did it take the ship to go from Swansea to the Azores? A. That was 12 days from Swansea to Azores, it must have been 8 or 9 days.
"Q. Do you know how many days after he did any work? A. Next day.
"Q. What doing? A. In the galley as second cook.
"Q. What was he doing before the accident?"

Mr. AXTELL. We can omit that. We know what he was. I will skip down to the next question.

"Q. Describe his appearance the day after the accident, or the time you saw him after the night you saw him? A. Very pale looking, very sick; he tell me he was awful sick."

Mr. LANDIS. I am going to object to the latter part of that and move that it be stricken out.

Mr. AXTELL. All right; I consent.

The COURT. Strike it out.

125 "Q. You say he was working that day? A. Yes.

"Q. How much work? A. Second cook's work.

"Q. How many days before he worked after day you thought he was hurt? A. I could not say for sure.

"Q. Who was in direct charge of Lustgarten? A. Second officer.

"Q. When he was cook? A. Chief cook.

"Q. Was there any chief steward on this ship? A. No.

"Q. No steward? A. No.

"Q. Duties of steward were performed by chief cook. A. Yes.

"Q. Was he white or colored? A. White.

"Q. Who was captain? A. I don't know.

"Q. What color? White or black?"

Mr. LANDIS. If your honor please, I am objecting to all of this.

Mr. AXTELL. I think we have pleaded that in the bill of particulars; that this man was an incompetent and improper person to put in charge of an American ship with a white crew.

Mr. LANDIS. If your honor please, the only complaint Lustgarten had, which he made on the stand, was that he was made to work two hours by the captain. There was not anything else wrong with the ship, or the conduct of the captain after the accident occurred.

The COURT. I will sustain the objection.

Mr. AXTELL. Exception; for the sake of the record.

The COURT. Now the question on page 7.

Mr. LANDIS. Page 7.

Mr. AXTELL. Skip to that place.

126 "Q. How many were Americans? A. I don't know, the whole crew I think.

"Q. Did you see any bruises or marks on this man's body? A. No.

"Q. Did you see him with his clothes off? A. No.

"Q. Was he laid up as sick on ship, before getting into Azores? A. Yes; after accident.

"Q. How long after accident? A. Several days.

"Q. Then he left ship at Azores? A. Yes.

"Q. Were you at Consullar's with him? A. Yes. I carried his clothes.

"Q. Did you hear any conversation with consulor and Lustgarten?"

Mr. AXTELL. That would not be admissable anyway. I won't read that.

The COURT. There was no conversation.

Mr. AXTELL. I was not even going to read the answer to the question. I did not read far enough ahead.

The COURT. All right.

"Q. How did the boy appear when you saw him last at the Azores?"

Mr. LANDIS. I am going to object to that.

The COURT. Objection sustained. You can read the answer to the last part?

Mr. AXTELL. "He was very lively?"

The COURT. Yes.

Mr. AXTELL (reading):

"Q. Did it ever occur to you that he may have been tubercular?"

Mr. LANDIS. I object to that, if your honor please.

127 The COURT. Objection sustained.

Mr. AXTELL (reading):

"Q. Did you see any chute on ship, such as a canvas chute or other chute used to dump garbage or slops from galley? A. No, sir.

"Q. Have you seen those on other ships? A. Yes.

"Q. What is appliance called? A. Just garbage chute.

"Q. Was there any on this ship? A. No.

"Q. During any time? A. No.

"Q. Are you sure? A. Yes.

"Q. How did they do it? A. They lift can over rail and dump it that way.

"Q. What size was it? A. 25 gallons.

"Q. Ordinary garbage can? A. A little smaller; about so high [witness illustrates 2½ feet].

"Q. Same as we have in city? A. Not as large.

"Q. How many men did it take to do this? A. It was pretty heavy and usually took two.

"Q. It is pretty heavy? A. Yes, and they have to lean over the rail.

"Q. When chute is used have you ever observed what the method of dumping is? A. To keep dirt off.

"Q. I mean means; how do they do it? A. Just lift foot off deck and slip it over.

"Q. Is it possible to use a smaller pail when chute is provided? A. Yes, it is possible.

"Q. Is that all you know about Lustgarten? A. I met him again in New York.

"Q. Did you hear him ask the captain or any officers to be relieved from duty after he was hurt? A. No, sir.

128 "Q. What duties did you see him doing or attempting to do after he was hurt? A. Same duties as before.

"Q. What were they? A. In the galley helping out cook.

"Q. What did that consist of? A. Second cook is supposed to be baking, washing pots and pans.

"Q. He was on duty and you saw him? A. Yes.

"Q. For how long after he was hurt? A. 3 or 4 days.

"Q. More than one day anyway? A. Yes.

"Q. When you left Swansea, Wales, what was the condition of the ship as to her drawing of water? A. Well, she was leaking in the

after peak. I don't know how much she was drawing, but she was leaking.

"Q. Was that discovered before she left? A. Yes.

"Q. How do you know? A. I discovered it.

"Q. Who reported it? A. I reported it to the chief officer.

"Q. What did he do? A. Tried to open steam jet to keep it out; then we rigged up a pump but it didn't keep it out and he let it go.

"Q. Were there any supplies there? A. Yes.

"Q. What became of them? A. They were ruined.

"Q. What were they worth?"

Mr. LANDIS. I am objecting to that.

The COURT. Objection sustained.

Mr. AXTELL. Well, I will omit that. [Continuing reading:]

"Q. What were they used for? A. Heavy gear for jumbo pump.

"Q. Any galley supplies? A. No, sir.

"Q. Where did the leak come in? A. In after peak of well.

129 "Q. In well? A. Yes.

"Q. Where in reference to rudder? A. On top of rudder.

"Q. Over stuffing boxes or hole where rudder goes out? A. You mean the king post?

"Q. Yes, king post? A. No, Hog Island ships are built differently from other ships.

"Q. Do you know whether or not the after peak became filled with water? A. Do you mean the lazarette, or the aft peak?

"Q. The fresh-water tank? A. Space on top.

"Q. Filled with salt water? A. Yes.

"Q. Did you notice whether"——

Mr. LANDIS. I am objecting to that, if your honor please, and move to strike out that answer until it be shown when that after peak was filled with water.

The COURT. Objection overruled.

Mr. LANDIS. If your honor please, it is very important, it seems to me, that if this peak was filled on the 12th of March and this accident happened on the 5th, that it has no pertinency at all.

The COURT. Objection overruled.

Mr. LANDIS. May I have an exception?

Mr. AXTELL (reading):

"Q. Did you notice whether it made a difference in the level of the ship? A. Made it harder to steer.

"Q. Were you steering at the time? A. Yes.

"Q. After the water leaking? A. Yes.

"Q. Had you steered her before? A. Yes.

"Q. What difference did you notice? A. It took an awful lot of wheel to keep her in course. It was hard to keep her on course.

130 "Q. How many points would she run off? A. Point and a half.

"Q. How many degrees? A. 60 to 70 degrees"——

Mr. AXTELL. I think that must be a mistake. The stenographer was very poor on this job.

"A. She was not so bad in good weather and only ran off one-half or three-quarters of a point.

"Q. It was bad weather leaving Swansea and it took 12 days' voyage. A. Not ordinarily.

"Q. Ordinarily it took 3 or 4 days? A. Yes.

"Q. Did the water in the aft peak have anything to do with the delay of the ship in making the Azores? A. In my opinion it would, it would make it heavier."

Mr. LANDIS. If your honor please, I object to this. As a matter of fact, the water in the after peak did not have any effect upon this delay and this man has not qualified as an expert.

The COURT. He has not qualified; I will sustain the objection.

Mr. AXTELL. Exception.

"Q. How much experience have you had at sea? A. Since 1915.

"Q. On deck? A. On deck.

"Q. Been going to sea all that time? A. Sail and steam.

"Q. Was there anything wrong with the ship's engines, that you know? A. No.

"Q. Or boilers? A. No; I don't know.

"Q. How many revolutions was she making? A. I don't know.

131 "Q. During rough weather, was she going full speed or half? A. Various speeds.

Q. Did you notice any difference in line of ship after the aft peak tank was filled with water, was it higher or lower? A. Lower.

Q. How much lower?"

Mr. LANDIS. If your honor please, it appears in this case that he never saw the draft of that vessel, and I am going to move to strike out that phase of the testimony.

Mr. AXTELL. All right.

The COURT. All right, strike it out.

Mr. AXTELL (continuing reading):

"Q. Did you notice any difference in the rolling of the ship, or her stability before and after water was discovered in aft peak?"

The COURT. These are all conclusions, aren't they? The next one particularly? He does not know anything about it, does he?

Mr. AXTELL. I will omit the rest of that. We have got plenty of other competent evidence.

"Q. Was she loaded? A. Yes.

"Q. What with? A. Coal.

"Q. What hatches? A. Nos. 1, 2, 4 and 5.

"Q. Was she fully laden? A. Yes.

"Q. How much freeboard did she have? A. Loaded to her marks.

"Q. When water was in aft peak did she dip her stern below mark? A. I don't know.

"Q. Did you have sufficient food——"

132 Mr. LANDIS. If your honor please, I object to that as incompetent, immaterial, and irrelevant.

The COURT. Objection sustained.

Mr. AXTELL. Well, I will omit it.

Then the cross-examination begins.

Cross-examination (read by Mr. LANDIS):

Mr. LANDIS. I want to read from page 14. There is one question I want to read. [Reading:]

"Q. Was any protest made by crew at going to sea with vessel in that leaking condition before she sailed? A. No, sir."

Mr. LANDIS. I do not think there is going to be a great deal of cross-examination that I am going to bother the court and jury with. Just the last page. [Reading:]

"Q. What is your rating now, are you seaman? A. A. S."

(Apparently, able-bodied seaman.)

"Q. You have been going to sea how long? A. Since 1915."

Mr. LANDIS. That is all.

Mr. AXTELL. There is one question on page 16. [Reading:]

"Q. Did you ever see garbage chute rigged on ship at sea in storm? A. Yes, by their staves.

"Q. In a storm? A. Yes.

"Q. What ship? A. Well, I couldn't recall names of ships.

"Q. Weather remained rough nearly all the voyage from Swansea to Azores, didn't it?"

Well, that is the other part.

133 Mr. AXTELL. I will read the deposition of Joseph Bradley Murphy. This was taken on the 6th day of January, 1927. [Reading:]

JOSEPH BRADLEY MURPHY, called as a witness on behalf of the plaintiff, being duly sworn, deposes and testified as follows:

"Direct examination by Mr. AXTELL:

"Q. You were born in the United States? A. Yes.

"Q. Did you know a boy by the name of Lustgarten on this voyage? A. Yes.

"Q. Do you know anything about him getting hurt? A. Yes.

"Q. Did you see the accident? A. No.

"Q. Were you on duty at the time? A. I wasn't on duty. I was in the forecastle.

"Q. How far from the place? A. 100 feet.

"Q. Did you see him afterwards? A. Yes.

"Q. How long? A. 20 minutes.

"Q. Where was he? A. In the forecastle.

"Q. What was his condition? A. Laying down on the deck.

"Q. Describe his condition? A. Laying on the deck and he seemed to have difficulty in breathing because of pain. Second mate came down and helped him in cook's room.

"Q. How long was he kept there? A. One day or two.

"Q. Did you see them requiring him to work after that? A. He worked after that.

"Q. Did you notice his physical condition? A. He seemed to be ailing all the time.

134 "Q. Did he make any complaint? A. Yes, he said his ribs were hurting and his side and back hurt.

"Q. Had you noticed this condition before the accident? A. No.

"Q. Anything unusual before the accident? A. No.

"Q. Any coughing or spitting or anything before the accident? A. No.

"Q. Had you seen him on the ship before the accident? A. Yes.

"Q. How many times? A. 700 or 800.

"Q. He was an ordinary seaman? A. Yes.

"Q. You were in the same department? A. Yes.

"Q. Did you ever work with him? A. Yes.

"Q. Did you notice anything unusual? A. No.

"Q. How did he appear? A. Good health.

"Q. Was he a willing worker or not? A. Yes.

"Q. Absolutely nothing wrong with him at that time? A. No."

Mr. LANDIS. If your honor please, I object to that.

Mr. AXTELL. All right; I consent that it be stricken out.

The COURT. Strike it out.

Mr. AXTELL (continuing reading):

"Describe his appearance? A. Rather youthful and playful; nothing in the matter of his appearance that I could remark on.

"Q. Happy disposition? A. Yes.

"Q. How big was he? A. About 130 or 140 pounds.

"Q. After the accident did he continue to work all the way? A. He got sort of light duty around the galley.

135 "Q. Did they keep him on duty all the time? A. Yes.

"Q. Where did he leave the ship? A. Punta del Garda.

"Q. What was his condition? A. He had to be helped into the boat.

"Q. He continued to work all the way? A. He got sort of light duty around galley.

"Q. But they kept him on duty all the time? A. Yes."

Mr. LANDIS. This is repetition down to here [indicating].

Mr. AXTELL. I will omit it, then. [Continuing reading:]

"Q. Did you ever hear him make any complaint about working? A. No."

Mr. LANDIS. If your honor please—well, go ahead.

Mr. AXTELL (reading):

"Q. Did you hear him make any request to officers or stewards in his department to be relieved? A. No. Anyone he spoke to he said he was ailing.

"Q. Any marks on his body that you saw, any bruises? A. He didn't carry himself right.

"Q. How? A. He didn't swing his arms like an ordinary man.

"Q. Where was he hurt? A. In his side and back.

"Q. Did the ship have what is known as a garbage chute? A. No.

"Q. Do you know what a garbage chute is? A. Yes.

"Q. Do you know whether it is customary for a ship to be equipped with a garbage chute?"

136 Mr. LANDIS. If your honor please, I do not know that this man is qualified to answer this question; it does not show how long he has been going to sea or anything else.

Mr. AXTELL. It does not appear——

The COURT. I will sustain it.

Mr. AXTELL. I won't press it. We have got plenty of other witnesses anyway. [Continuing reading:]

"Q. How was the ship behaving? A. Rolling.

"Q. What was she loaded with? A. Coal and building stone.

"Q. How far? A. Below the Plimsol mark.

"Q. Did she have a Plimsol mark? A. Yes.

"Q. Did you see it? A. Yes; I remarked on it being on the American ship as they seldom had it, but they carried it as a mark of courtesy.

"Q. Was that Plimsol line below water when you left port? A. Yes.

"Q. Where? A. Fore or aft or amidships? A. Fore.

"Q. How much? A. Two feet down.

"Q. How about the stern? A. About the maximum load line.

"Q. Midships? A. A little below.

"Q. How many days out of port was it when the aft peak was full of water? A. Started taking water immediately.

"Q. Did that make any difference? A. It put her stern down more.

"Q. How did the ship steer? A. Steered rotten.

"Q. Had you steered her any before she left Swansea? A. Yes; coming down.

"Q. How did she steer then? A. Rotten; you couldn't keep her within two points of her course.

137 "Q. In bad weather how did she steer? A. Bad.

"Q. How in points? A. You could keep her within two points of her course.

"Q. Her steering engine was not broken? A. No.

"Q. What effect did that have on her taking seas aboard? A. Well, if you couldn't steer"——

Mr. LANDIS. If your honor please, I am going to object to this. That calls for——

The COURT. Objection sustained.

Mr. AXTELL (continuing reading):

"Q. Where were you when this man was working? A. Aft.

"Q. On midships deck? A. Yes.

"Q. Did you see any seas coming up on that deck? A. Yes.

"Q. Did you see any? A. Yes; they would come up and hit the house.

"Q. Who was steering at the time? A. I don't know.

"Q. What time was it? A. About 3 p. m.

"Q. You are not certain? A. No.

"Q. You think it was in the afternoon? A. I think it was; no, it couldn't have been; I wasn't on watch.

"Q. What was your watch? A. 12 to 4.

"Q. You were not on watch at the time of the accident? A. No; it must have been in the afternoon, after 4.

"Q. You are not very certain? A. No.

"Q. What was the effect of her steering off two points as to seas coming aboard midships?"

Mr. LANDIS. I object to this.

The COURT. Same ruling.

Mr. AXTELL. Exception (continuing reading):

138 "Q. Did you observe that yourself? A. Yes.

"Q. On the day of the accident it was a moderate sea? A. Moderate swell.

"Q. Ordinarily would seas come aboard? A. Yes."

Mr. LANDIS. If your honor please, I object to that.

The COURT. Same ruling.

Mr. AXTELL (continuing reading):

"Q. If she was properly loaded and in good steering condition would the seas come aboard?"

Mr. LANDIS. I object to that.

The COURT. Same ruling.

Mr. AXTELL. The question I want is:

"Q. If that ship had steered properly and had not been overloaded, considering the weather condition do you think seas would have come aboard midships?"

Mr. LANDIS. I object to that.

The COURT. Objection sustained as immaterial.

Mr. AXTELL. What is you honor's ruling as to the answer? The same?

The COURT. Yes.

Mr. AXTELL. Exception. That is all; your witness.

Cross-examination (read by Mr. LANDIS):

"Q. After he was hurt, the mate came to him, or one of the mates came to him and carried him somewhere? A. Yes.

"Q. He received no medical treatment? A. No.

"Q. How were the seas? A. Port on.

139 "Q. How much? A. 3 points on the port bow.

"Q. That was your observation? A. Not on that day only, but on the whole trip.

"Q. What side did the accident happen on? A. Port side.

"Q. Did you ever see an ash chute used at sea under those conditions? A. Yes; but on the lee side of the ship instead of the weather side.

"Q. You have seen ash chutes used? A. Yes.

"Q. What ship? A. Every ship.

"Q. How much was it down by the stern and up by the head? A. It was the other way around; she was down about 2 feet by the head.

"Q. Where is this aft peak tank? A. Aft.
"Q. And it got full of water? A. When we got out to sea.
"Q. Did the flooding of the aft peak tank affect the trim of the ship? A. Yes; it brought her about on even keel.
"Q. At the time of the accident she was about on even keel? A. Yes.
"Q. You feel sure? A. Yes.
"Q. Other witnesses have testified she was down by the stern? A. Never was.
"Q. If she was on even keel her steering wasn't affected? A. Yes; loaded too deep to steer ship, and that type of ship never steers well anyway.
"Q. Then do you mean to say that a light ship sails better than a loaded one? A. Yes.
"Q. Under all conditions? A. Not all, but general conditions.
"Q. How much below Plimsol mark would you say? A. Mark was in water.
"Q. How far? A. 6 inches."
Mr. LANDIS. That is all.
Mr. AXTELL. This is the deposition of Vernon Flynn:

140 VERNON FLYNN, called as a witness on behalf of the plaintiff, being duly sworn, deposes and testifies as follows:

Mr. AXTELL. I may say that this man says he is a sailor. I can narrate this one if that will save time here.
The COURT. You had better read it.
Mr. AXTELL (reading):
"Direct examination by Mr. AXTELL:
"Q. You are a sailor? A. No; a wiper.
"Q. Where were you born? A. Philadelphia.
"Q. Father and mother living? A. Mother.
"Q. Where does she live? A. 542 Sixth Avenue, Brooklyn, N. Y.
"Q. That is your home? A. No; I make my home in Baltimore; that is my mother's address.
"Q. What is that address? A. 802 South Broadway.
"Q. Still going to sea? A. Yes.
"Q. Expect to go to sea again? A. Yes.
"Q. Within a short time? A. As soon as possible.
"Q. Were you on the S. S. 'Coelleda' at one time? A. Yes.
"Q. Did you know a boy by the name of Lustgarten? A. Yes.
"Q. What was he? A. A. B.
"Q. Do you know anything about any accident to him. A. Yes; I seen it.
"Q. What part of the ship was it on? A. Midships, port side.
"Q. Do you remember where the ship was? A. 4 or 5 days out from Swansea, Wales.
"Q. What were the weather conditions prevailing? A. Big swell, rough seas.
141 "Q. How long had the ship been in heavy weather before that? A. Ever since we left Swansea.

"Q. How was she loaded? A. Right down to the water line.
"Q. With what? A. Coal, full capacity.
"Q. Did you notice her Plimsol mark? A. I don't know whether she had one.
"Q. How much freeboard did she have on her well deck when she was on even keel? A. Four or five feet to my knowledge.
"Q. Did she have a bulwark on her deck?"

May we agree that "the freeboard" means the distance between the main deck and the water level? I mean, I do not know whether the jury knows all that.

Mr. LANDIS. Yes, but I do not see that that is particularly pertinent.

Mr. AXTELL. That means the level of the well deck.

Mr. LANDIS. It does not show or appear when he made that observation.

Mr. AXTELL. He says on leaving port. It is just a question of the term, that is all. I wanted the jury to understand the deposition as we read it rather than explain it by an expert afterwards.

"A. Yes.
"Q. That is a solid rail? A. Yes.
"Q. This happened on midships deck? A. Yes.
"Q. That is higher than the well deck? A. Yes.
"Q. How much. A. 7 or 8 feet.
"Q. And where with reference to galley? A. 25 feet or 35 feet from galley.
"Q. Where the accident happened? A. Yes.
142 "Q. Tell what you saw happen? A. He brought this slop bucket out of the galley with slops and ashes in it and they were hot ashes, because I seen steam coming out.
"Q. How big was it? A. Two and one-half feet or three feet.
"Q. High? A. Yes.
"Q. How wide? A. Two feet in diameter.
"Q. Was he alone? A. Yes.
"Q. What did he do? He dragged it down the deck from the galley to the deck where he is suposed to dump it. He put his foot through the rail to steady himself and lifted the bucket up and as he did it and tilted it over, a spray came up and hit him in his face and then the sea came up and knocked the ashes over his shoulder and the bucket went over his head and just then I saw two of the A. Bs. that were standing there go down and pick him up and he came into his room.
"Q. How much water came over? A. That I can't say very clearly, but the spray came up on the bridge deck and right over to the well deck.
"Q. You saw a spray; what do you mean? A. The spray hit him first and then the wave came up and hit the bucket.
"Q. How high was that from the deck? A. Four feet.
"Q. This sea came up about four feet? A. Yes.
"Q. And he was carried from there? A. Yes.

"Q. How far? A. 50 feet to his room.

"By the water? A. No; the water just knocked him back about 6 feet or 8 feet.

"Q. Where was bucket afterwards? A. Fell down, rolled down on ship's side.

"Q. Any ash chute on that ship? A. Yes; but they were stored away on the aft peak.

143 "Q. Had it been up during the voyage? A. Not that voyage it hadn't been up. They were taken in the trip before when we got to Baltimore.

"Q. Was there any permanent ash chute? A. There were rings there for it to be secured by.

"Q. What was the construction, design, and size? A. The ash chute itself was about 3½ feet long.

"Q. What was it made of? A. Wood or iron.

"Q. Was it heavy construction? A. Pretty heavy.

"Q. It could be lashed down? A. Yes; it could be lashed to ring bolts, and secured that way.

"Q. When did you last see it up on that ship? A. Trip before going to Baltimore.

"Q. Was it up going across that trip? A. No; not that trip.

"Q. Wasn't used the whole voyage going or coming? A. No, sir.

"Q. What was done with Lustgarten after the accident? A. I didn't see him after the accident; he stayed in his bunk all that day and the next day the captain told him he better go to work and Lustgarten said he was"——

Do you want that stricken out?

The COURT. Do you want that stricken out?

Mr. LANDIS. Yes.

Mr. AXTELL (continuing reading):

"Q. You heard him say that? A. Yes; he told the captain he was sick."

Mr. AXTELL. I didn't know he was there.

"Q. What was his appearance—or what did you note, if anything, about his appearance at that time? A. After the accident, the

144 next day when I see Lustgarten in his room, I asked him to show me his chest and he stripped and he had all blisters over his back where the hot ashes had gone over his back.

"Q. Did you notice the marks? A. On his side, and his one eye was closed and he was complaining about having something in his eye.

"Q. Any bruises or marks on his forehead? A. On here [witness indicated place right between eyes].

"Q. How did the man look or act? A. Pretty sick the next day.

"Q. Was he eating? A. No; he couldn't.

"Q. Did he go to work after the captain told him? A. Yes; as P. O. mess man.

"Q. Was he working? A. I seen him working or dragging himself around trying to work.

"Q. Did you see him before the accident? How did he look then? A. Yes, sir; fine and healthy.

"Q. Did he have any idea"——

Mr. LANDIS. I object to this.

The COURT. He asked him whether he had any coughing or spitting?

Mr. AXTELL. I do not get that.

The COURT. You may ask the question as to whether he had any coughing or spitting.

Mr. AXTELL (reading):

"Q. Did he have any coughing or spitting? A. No; he was the last man I would say had that.

"Q. After the accident? A. After, I noticed he spit blood.

"Q. What did you notice? A. He or I used to go up and sit with him and every time he would cough he would cough blood and there would be blood all over.

145 "Q. How many times did you see that? A. Four or five times in one night.

"Q. Was he working at that time? A. He was.

"Q. Did he at any time make any protest to the master or officers about working? A. Just the time I told you about and the captain said he had better go to work.

"Q. What kind of a looking man was the captain?"

Mr. LANDIS. I object to that, if your honor please.

The COURT. Objection sustained.

Mr. AXTELL. Exception. I will omit the other questions relating to the description. Page 9, the question on top of the record. I suppose your honor will sustain the objection? That will be sustained?

The COURT. Yes.

Mr. AXTELL. I suppose I had better omit the next questions then.

The COURT. Yes, I think so.

Mr. AXTELL. If your honor wishes me to keep that element out of this case I shall try my best to do so.

"Q. Did Lustgarten come right to New York? A. No, they put him off in the hospital at Punta del Garda."

Well, we do not want that. There is no use to read that. And the doctors examined him; we will omit that, with your consent, Mr. Landis.

"Q. How did she steer going over? A. Steered good.

146 "Q. Did you notice the wake of the ship going over? A. Yes.

"Q. How would you see it in rough weather? A. You can always see it in any weather.

"Q. What were the conditions? A. You can see it for 50 yards. One minute it is this way, and one that way.

"Q. What was the effect of that on the ship as to the seas coming aboard?"

Mr. LANDIS. If your honor please, I object to that. This man is not an expert. He was a wiper down in the engine room and he does not know what the effect of seas coming aboard that ship was. It certainly calls for an opinion, if your honor please, and this man is not qualified as an expert.

Mr. AXTELL. I won't press it.

The COURT. Just a minute.

Mr. AXTELL. I will omit all that page, your honor.

The COURT. Just a minute. In view of the testimony on page 5 I will hear you in the morning on the objection as to this line of testimony, as to the effect of the seas. My prior ruling was based upon the plaintiff's testimony and did not have anything to do with the accident. It may be material in view of the testimony on page 5. But you can reserve that until the morning.

Mr. AXTELL. Yes. Of course we made the claim in the complaint that it did have a bearing.

The COURT. I assumed that the plaintiff's testimony would be corroborated.

Mr. AXTELL. I am over at page 11, I believe. I will omit
147 that testimony on page 9, it seems to be hearsay, down at the bottom mostly.

The COURT. I thought you were on page 11.

Mr. AXTELL. I was too far. Yes, I wish to omit 10, too. Now, at page 11 (reading):

"Q. Do you know anything about any leak in the ship? A. Yes, aft peak.

"Q. When did you see it? A. Before we left port I went straight down and saw it myself.

"Q. Could you see water coming in? A. Couldn't see water coming in, but the first assistant and myself went down and opened steam jet and tried to get the water out.

"Q. Did you succeed? A. No.

"Q. Did you notice whether any stores were in the water? Did the captain get them out? A. No, sir.

"Q. Went to sea with them in the water? A. Yes.

"Q. Did you notice any wire there? A. Two brand new wire hawsers.

"Q. Were they lashed? A. No, sir.

"Q. Did you see them afterward? A. I seen them when they were trying to get them out in New York afterwards.

"Q. You saw wire coming out? A. Yes.

"Q. What was its condition? A. All wrinkled and crumpled up, not fit for use.

"Q. How did they get it out? A. Pulled it up by winch through hatchway."

Mr. LANDIS. This is all immaterial.

Mr. AXTELL. It only relates to the behavior of the ship and its rolling, and the tearing off of the cover of the fresh-water
148 tank off the Azores. The ship went to sea, as we allege in the

bill of particulars, with this after peak full of stores, not secured, and the rolling of the ship tore off the cover of the fresh-water tank, making it necessary to put into the Azores.

Mr. LANDIS. That all occurred after the accident happened. They went in to the Azores for this plaintiff's benefit, because they got there at least four days before they could get to New York.

Mr. AXTELL. The Azores is not a very good place to land a sick man.

Mr. LANDIS. That is a question——

Mr. AXTELL. Had the vessel been seaworthy in making this trip she would have been here at least ten days before.

The COURT. You need not argue this now. What is the question?

Mr. AXTELL. Well, I will omit that.

"Q. Did you see the manhole for fresh-water tank? A. Yes.

"Q. Where did you see that? A. In Baltimore. I tightened it down.

"Q. Did you see it in the Azores? A. Yes, when I went down to see the leak."

Mr. LANDIS. If your honor please, there is nothing to identify all this with the accident in any way. It all occurred, as a matter of fact, after the accident happened, and why this should go in and clutter up the evidence that is being placed before the jury in this very complicated case anyway, I do not understand. I do not think it should. All of this occurred after the accident it supposed to have happened. The manhole cover was torn off on the 11th. That is five days, six days, after the accident is supposed to have occurred.

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Mr. AXTELL. It is merely evidence of the unseaworthy condition of that ship on leaving Swansea, Wales.

The COURT. Mr. Axtell, the ship may have been grossly unseaworthy, but that must be the proximate cause of this accident.

Mr. AXTELL. She was rolling; that was the important part of it. We want to show how she rolled and pitched, tearing herself to pieces all inside.

The COURT. Tearing herself to pieces inside certainly did not affect this man.

Mr. AXTELL. It is evidence of the degree of rolling.

The COURT. The only evidence that has any connection between all of this testimony and this accident is that he got hit in the back, as he testified, or as one of these witnesses testified, hit in the face with spray.

Mr. AXTELL. I shall not press that part of it. I will omit the rest of pages 12 and 13. That brings up the cross-examination.

Cross-examination (read by Mr. LANDIS):

Mr. LANDIS. I am probably going to read this whole cross-examination. I did not know whether you wanted to let that go until to-morrow or proceed now.

The COURT. No; let us get through with this deposition.

Mr. LANDIS (reading):

150 "Q. Did you see the accident? A. Yes.

"Q. How far from the accident were you when it occurred? A. Between 10 and 15 feet."

The COURT. What page is this?

Mr. LANDIS. Sir?

The COURT. What page is this?

Mr. LANDIS That is at page 14. I left the first out.

The COURT. All right.

Mr. LANDIS (continuing reading):

"Q. What deck? A. Bridge deck.

"Q. Is that where the accident occurred? A. Yes.

"Q. On the bridge deck? A. Yes.

"Q. Forward or aft? A. Aft.

"Q. Were you looking in that direction? A. Right in that direction when the accident happened.

"Q. What time of day was this? A. Between six and seven in the evening.

"Q. What time did you have supper? A. Five.

"Q. Are you sure it was between six and seven in the evening? A. Yes.

"Q. What time of year was it? A. February, 1926—no, March, 1926.

"Q. Were there any lights on this deck A. No; lights there but they weren't on.

"Q. Dark or daylight? A. Getting dark.

"Q. How far out were you from Swansea when the accident occurred? A. Four or five days; I am not sure which.

"Q. And your course was southwest? A. I can't answer that question; I don't know what the course was.

"Q. Could you see the accident clearly? A. Yes.

151 "Q. The darkness didn't interfere with you? A. No.

"Q. How did you happen to be there? A. I was standing talking to two sailors when the accident occurred.

"Q. Did you see anybody else around? A. Just the two sailors who picked him up.

"Q. Do you know what their names were? A. Tyburski and Gaft."

It is "G-a-f-t" here. G-r-a-f-f was the man.

Mr. AXTELL. Graff.

Mr. LANDIS (continuing reading).

"Q. Did you see them make any effort to help this man with the pail of ashes? A. No effort to help him with the pail of ashes.

"Q. How far was this from the galley? A. 25 or 30 feet.

"Q. How did it happen he had to drag it that far? A. That's the way he had to do it.

"Q. Why? A. Unless he wanted to carry it down the steps and across.

"Q. Why couldn't he dump it there? A. It isn't on side of ship.

"Q. It is 25 or 30 feet away and he went immediately over there."

Mr. LANDIS. Well, that is out, too. [Continuing reading:]

"Q. How large?"

Mr. LANDIS. Well, I will let that go. [Continuing reading:]

"Q. Did you watch the whole progress of his dragging the bucket from the galley? A. Yes.

152 "Q. And you saw him put his foot through the rail? A. Yes.

"Q. And you could see that plainly? A. Yes.

"Q. He put his foot through the rail before he lifted the bucket up? A. Yes.

"Q. What kind of a rail was it? A. Iron rail.

"Q. What else? A. It's to keep you from falling. Two rails there, front to stanchion and then a chain rail run around to ladder, these two iron rails to ladder.

"Q. The chain is outside and the iron inside. A. No, iron is on outside and the chain runs inside.

"Q. He had to lift the bucket up to the top rail? A. Yes.

"Q. How far up? A. Four feet.

"Q. Above deck? A. Yes.

"Q. How much do you suppose this bucket full of ashes weighed? A. (No answer.)

"Q. Have you ever lifted the bucket? A. Not that particular bucket.

"Q. One similar? A. Yes.

"Q. How much did it weigh? A. 200 to 250 pounds.

"Q. Did you lift it yourself? A. Yes.

"Q. How much did Lustgarten weigh? A. When he came aboard ship you mean?

"Q. Yes. A. About 160 pounds.

"Q. How old was he do you suppose? A. 23 or 24.

"Q. How tall? A. Five feet six inches.

"Q. Would you say the bucket Lustgarten had was as big as the one you describe? A. Yes.

"Q. The same sort? A. On the same principle but too heavy for him to lift.

"Q. Had he gotten practically up on the rail when the wave came along? A. Just got it to rail.

153 "Q. Was it posed on rail? A. Just a little went out when the wave came over.

"Q. Did you see the little that went out? A. Yes.

"Q. What do you suppose that was? A. Just a little, it didn't go over side, it just fell on deck.

"Q. Describe again what water came over and next accident? A. Wave came over about 4 feet from rail and Lustgarten was standing——

"Q. Did you say something about a spray? A. Spray came first.
"What effect did this have? A. Got into his eyes.
"Q. Knock him over? A. Not the spray; it was the wave.
"Q. How far above rail did the crest of the wave come? A. Rail, not deck.
"Q. Rail where bucket was? A. Four feet.
"Q. Four feet above rail? A. Yes.
"Q. First it hit bucket and knocked it out of his hands and then knocked him and knocked it on Lustgarten? A. Yes.
"Q. How far did he get thrown? A. About three feet.
"Q. Which direction; back toward the galley? A. Yes.
"Q. Where did the bucket fall? A. Over side of rail.
"Q. What did you do? A. Stood there while they picked him up.
"Q. You didn't go over? A. No; two sailors got there first.
"Q. Did you see what happened the ashes? A. I don't know what became of bucket after that.
"Q. I don't mean the bucket; what happened the ashes? A. I don't know.
154 "Q. You remember perfectly the few he dumped out, but you don't remember what happened them after the accident? A. No.
"Q. Was there anybody else immediately around Lustgarten at the time these two seamen picked him up and took him to the captain? A. Just the one man coming over the deck.
"Q. No officers of the ship? A. No; no officers were around.
"Q. How did it happen that you were so interested in what he was doing that you watched him so closely? A. I was looking at seas that were running at the time.
"Q. Then you weren't looking at him? A. In his direction.
"Q. Forward or aft? A. Aft.
"Q. What sort of a sea was running? A. High, 20 or 30 feet high.
"Q. What direction? A. Head on.
"Q. Coming over port side? A. The starboard side.
"Q. Port or starboard? A. Starboard side, lee side he was on but bad steering made them cover over the port side.
"Q. How big a wave was it that struck Lustgarten? A. 25 or 30 feet high.
"Q. Were all the waves the same size? A. Different sizes.
"Q. Was that exceptional? An exceptionally large wave for the particular sea that was running? A. Not then; we had higher than that.
"Q. Much wind? A. No; decks were flooded.
"Q. Were you ever in a hurricane? A. Yes.
"Q. When? A. In 1924, in China.
"Q. Never in hurricane on this trip? A. I don't know what you would call that, but it was just as bad as the one that we were in in China.

155 "Q. According to the testimony you gave on direct examination this was just half as large as the worst you have been in? A. Just half as large and sometimes worse.

"Q. At the time of the accident? A. I told you when it happened it was 25 or 30 feet high.

"Q. Lustgarten didn't get thrown up against the rail? A. No; thrown away from the rail.

"Q. You didn't feel concerned about him at all? A. The two sailors beat me to it; they already had him up when I got there.

"Q. But you testified that the last time you saw this ash chute was prior to the ship's going into Baltimore the last trip? A. Yes, it was.

"Q. How many ash chutes did they have? A. Two.

"Q. How many places? A. Two places midships, one starboard and one port, and they can lash it aft.

"Q. Was this a large enough sea to wreck a chute if it was up? A. No; if it was lashed down.

"Q. Is it your experience that in high seas ash chutes are left out? A. I have seen them out but lashed down.

"Q. Is it the general custom of the ship to have it out? A. I have been on a couple that didn't have any.

"Q. That doesn't answer my question; have you been on ships where the ash chutes were taken off? A. Only to paint.

"Q. Never taken them off in ships you have been on because of high weather? A. No.

"Q. And you swear that it was never used on this voyage either across to England or back? A. No.

"Q. When did you next see Lustgarten after the accident occurred? A. Yesterday."

156 Mr. LANDIS. That deposition was taken January 14, 1927 [continuing reading]:

"Q. When? A. Yesterday.

"Q. That isn't the question I asked? A. You mean the next time after the accident?

"Q. Yes. A. The next day.

"Q. What time? A. Three o'clock the next afternoon.

"Q. What were the hours that you were on duty? A. Eight in the morning until 5 in the evening.

"Q. Were those always your hours on that ship? A. On that ship I was oiler, water tender, fireman, wiper, and everything.

"Q. How did it happen you left your duties to go up and make a friendly call on Lustgarten? A. I used to come up for coffee every afternoon when I could get it.

"Q. Was that the custom? A. It was on pretty near every ship I have been on but that one.

"Q. How long did you take? A. About 20 minutes.

"Q. How long did you talk with Lustgarten? A. Ten minutes.

"Q. Was anyone present? A. There was another man sick in the hospital with him.

"Q. How many beds in the hospital? A. Two beds, needed three.
"Q. What was the name of the man that was present at that time? A. I can't think of his name; he was an ordinary seaman.
"Q. Was Lustgarten in bed? A. Yes.
"Q. You testified, did you not, that you saw Lustgarten stripped? A. Yes; I did see Lustgarten stripped.
157 "Q. How did he happen to do that? A. I asked him to show me his body.
"Q. Did he take off all of his night clothing? A. Everything off.
"Q. What did you see? A. Blisters and scars on his back where the ashes burned him and his eye was closed and he complained about it and there was a mark between his eyes and his side was black and blue.
"Q. Did he attempt to explain how the blisters got on his back? A. From the ashes.
"Q. Did he attempt to explain how they got there? A. That bucket come over and hit his shoulder.
"Q. How much of his back from the shoulder? A. From his shoulder to about 6 inches down his back.
"Q. Just the back with blisters? A. Yes.
"Q. None on front of his body? A. None on front of him.
"Q. Did you hear any conversation between the captain of the ship and Lustgarten on the day following the accident? A. Not on the day following the accident but the day following I did.
"Q. Second day after? A. Yes.
"Q. What time? A. About five-thirty or six.
"Q. Was Lustgarten in bed? A. Yes."
"Q. When did you see him cough blood the first time you seen him? A. The day after the accident.
"Q. At three o'clock in the afternoon? A. Yes.
"Q. How many times did he cough blood? A. Three times in the afternoon and four times that same night."
The COURT: What page is that?
Mr. LANDIS: That is page 26.
158 "A. Three times in the afternoon and four times that same night."
"Q. Did you at any time while in England leave this ship without leave? A. Yes; in Manchester."
This is on page 29 [reading]:
"Q. Is that the only time? A. Yes; without leave.
"Q. You weren't absent from duty at Swansea? A. Yes; I was absent from duty at Swansea.
"Q. Did you refuse to turn to at Avenmouth? A. No; I didn't refuse to turn to.
"Q. Is it the practice of you to leave ships without leave? A. No.
"Q. How did you happen to do it in this case? A. To get something to eat.
"Q. Did you have any leave while you were in England? A. Did I have any leave? Why, yes.

"Q Did you have any leave in Manchester? A. Yes.
"Q. Swansea? A. Yes.
"Q. Avenmouth? A. Yes."
Mr. LANDIS. That is all.
Mr. AXTELL. There is one question at the bottom of page 27. [Reading:]
"Q. Any other evidence of his getting worse as the voyage continued?"
Mr. LANDIS. I object—go ahead.
Mr. AXTELL (reading):
"A. His eyes were sinking back in his head."
This is a question on page 28. [Reading:]
159 "Q. Did Lustgarten walk off that ship? A. He got helped down the ladder from the ship.
"Q. Who helped him down? A. Two sailors helped him down.
"Q. Was the ship at a dock right up to safe anchorage taking on oil? Taking on oil; yes.
"Q. Lustgarten didn't fall going down the ladder? A. No."
And then, at the end. [Reading]:
"Q. Did you encounter heavy seas all the time from the time you left Swansea to the Azores? A. Yes, and worse after."
Mr. AXTELL. That is all.
The COURT. We will take a recess until 10.30 to-morrow morning, gentlemen.

Adjourned to Thursday, June 16, 1927, at 10.30 o'clock a. m.

NEW YORK, *June 16, 1927.*

Mr. AXTELL. I will read the deposition of Mr. Charles Smith.
"Direct examination by Mr. AXTELL:
"Q. What is your name? A. Charles Smith.
"Q. A little deaf, are you? A. Yes.
"Q. Were you on the SS. 'Coelleda' with Lustgarten when he was there? A. Yes.
"Q. What were you? A. Wiper.
"Q. Do you know anything about the accident? A. I only know about the next day. I seen his eye; it was swollen and red and I asked him what happened and he told me."
160 Mr. LANDIS. If your honor please, I am going to prove to strike out that answer in that case. It is proving the accident by hearsay.
Mr. AXTELL. But I am not repeating what he told him.
The COURT. Is this the deposition of Charles Smith?
Mr. AXTELL. Yes.
Mr. LANDIS. He asked him did he know anything about the accident, and he answers saying, "And I asked him what happened and he told me."

Mr. AXTELL. He said, "I seen his eye; it was swollen and red and"—that is enough.

Mr. LANDIS. The question speaks of an accident which Mr. Smith never saw and knows nothing about.

Mr. AXTELL. It is too late to object to the question.

The COURT. Which question is it?

Mr. AXTELL: "Q. Do you know anything about the accident?" Then I asked leave to read into the record, "I seen his eye; it was swollen and red."

The COURT. That may be allowed.

Mr. LANDIS. May I have an exception?

Mr. AXTELL. Question on page 3.

"Q. Did you see him before that on the way over? A. Yes.

"Q. What was his general appearance and condition of health? A. Well, he looked like he could face a physical examination to me, he must be to get A. B. ticket."

Mr. LANDIS. If your honor please, I move to strike out the answer to that question.

161 Mr. AXTELL. Strike out, "he must be," that is a conclusion. I consent to that. [Continuing reading:]

"Q. After the accident did you notice any difference in his appearance and condition? A. Yes, sir.

"Q. What? A. Like blood coming out of his eye and mouth like.

"Q. You saw blood coming out? A. Yes.

"Q. How much from his mouth? A. Well, a hemorrhage.

"Q. A hemorrhage? A. Well, may be not a hemorrhage, but when he would spit he would spit blood.

"Q. How many times would you notice this? A. I can't say how many times I seen him during the day when I passed the room.

"Q. Did he complain to anyone of any pain or suffering or any injury to his lungs or chest?"

Mr. LANDIS. I object to that, if your honor please.

The COURT. Yes.

Mr. AXTELL (continuing reading):

"Q. Did you notice any injury? A. No; but he couldn't talk, at least I couldn't hear him after that.

"Q. Did you notice that before? A. I went ashore with him, but he talked loud enough for me to hear.

"Q. You were deaf then? A. Yes.

"Q. You had no accident on this ship?"

Mr. LANDIS. I object to that.

Mr. AXTELL. I won't press that. There is nothing more on that page. I won't press that at the top either, since he does not know.

162 Mr. LANDIS. At the top of page 5?

Mr. AXTELL. Yes.

Mr. LANDIS. Then I will read it in if you do not.

Mr. AXTELL. Well, if you want it in, certainly. You can read it now or I will read it. Which part is it that you want to read and it will save an interruption?

Mr. LANDIS. Down here [indicating].

Mr. AXTELL. On page 4?

Mr. LANDIS. The bottom questions.

Mr. AXTELL (continuing reading):

"Q. Did you notice whether there was an ash chute on that boat at any time? A. Yes; they had it on several different places; they shoved it around several times.

"Q. How long were you on that boat? A. Five months altogether.

"Q. At the time of the accident was there any ash chute up? A. (No answer.)

"Q. At the time of the accident do you know whether there was any ash chute lashed on the deck? A. I don't know; it has been a year ago since I was there.

"Q. You don't know anything about that? A. Yes.

"Q. That is all you know about this case? A. I don't know much about this Lustgarten case.

"Q. Did you notice anything about the steering of the ship?"

Mr. LANDIS. Well, that is not it.

Mr. AXTELL. What is the use of reading that? Page 6. [Continuing reading:]

"Q. Did you notice how much freeboard she had, that is,
163 between level of water and after well deck, after she left port of Swansea? A. When she left Swansea—well before we left Swansea—there was water coming out of ship after and after they kept loading her down with coal she kept leaking aft.

"Q. Did you notice the distance from the water up to her well deck after from the time she left port, that is how much freeboard she had, the distance between the water and the level of the deck? I am speaking of the aft well deck, the distance as you stand and look over the rail. A. Well, she was loaded pretty deep; I couldn't say how far but I know she was loaded below that insurance mark and then every day when she was leaking it would go down a little further.

"Q. How did she compare as to depth in the water, as to the trip going over? A. She was loaded. That trip coming back was the worst; she was going down that ship."

Mr. LANDIS. If your honor please, I object to that and move to strike it out.

The COURT. Strike it out.

Mr. AXTELL (continuing reading):

"Q. How did that compare with any other trip? A. I was never on.

"Q. But this ship you were on before, weren't you? A. The trip before.

"Q. How was she loaded that time?"

Mr. LANDIS. If your honor please, it has not anything to do with this case.

The COURT. Sustained.

Mr. AXTELL. Exception. That is all.

Mr. LANDIS (reading):

164 "Cross-examination by Mr. LANDIS:

"Q. Did you see blood coming out of this man's eye? A. It was all bloodshot. And every time he would wipe his eye there was some kind of ashes there and all over his eye it was bloodshot.

"Q. Was his eye bleeding a great deal? A. Not a great deal.

"Q. On what day was this? A. After the accident about two days.

"Q. Did you say two days after the accident, about? A. Day after.

"Q. You didn't see him two days after? A. Once or twice after in the galley working.

"Q. Did Lustgarten, the second cook, wait on the table at all petty officers' meals? A. One meal.

"Q. Did you look at her marks the day before she sailed at noon? A. Not the day before, no."

Mr. AXTELL. I will read the deposition of Robert Amundsen. He is the next one. This is a deposition taken on the 10th of September, 1926. [Reading:]

"Direct examination by Mr. AXTELL:

"Q. What is you name? A. Robert Amundsen.

"Q. What is your occupation? A. A. B.

"Q. A seaman? A. Yes.

"Q. You go to sea for a living? A. Supposed to.

"Q. Are you a ship now? A. No; I just left one about ten days ago.

"Q. Do you expect to go to sea soon? A. As soon as I get away from here.

"Q. Were you a seaman on the steamship 'Coelleda'? A. Yes.

"Q. Do you recall the date you signed on? A. On the 10th of October.

165 "Q. You mean the last trip? A. The last trip.

"Q. When did you sign on? A. The 28th of October, 1925.

"Q. You had been on the ship some time previous? A. Two previous—before.

"Q. And on that voyage where did the vessel go? A. On the last trip?

"Q. Yes. A. Went to Manchester, Avonmouth and Swansea, Wales.

"Q. Do you recall Benjamin Lustgarten on that vessel? A. Yes.

"Q. What was his job on that trip? A. He came aboard as an A. B., but then he got second cook's job after Damico got sick.

"Q. On the last voyage that you made on the 'Coelleda' you signed on the 20th of January, 1926 (and not on October 28, 1925 as you stated before), is that right? A. Yes, that is right.

"Q. You had been on that ship for two voyages before? A. Yes.

"Q. Was Lustgarten on the vessel for more than one voyage? A. I am not quite sure if he was or not; they was changing right along. I do not think he was; I think only on the last trip.

"Q. And that is the voyage you signed on January 20, 1926? A. Yes.

"Q. Do you recall any accident to Lustgarten on this voyage? A. Yes.

"Q. On the return voyage? A. Yes, from Swansea.

"Q. The vessel was proceeding toward the United States? A. Yes.

"Q. How far was the vessel from Swansea? A. I can not tell you exactly. I think it was at the beginning of the voyage, about three or four days out, or five, something like that; I do not know
166 exactly. I know that it was beginning of the trip.

"Q. Did you see the accident to Lustgarten? A. Yes, I did.

"Q. Where were you? A. I was coming right out from the boat I was going toward midships.

"Q. And where was Lustgarten? A. He was right at the rail trying to dump his ash pail, or garbage can, or whatever you call it.

"Q. On what part of the ship was Lustgarten? A. On the port side, going to the after part of the midships section.

"Q. Is that right at the break of the line next to the well deck? A. Yes; that is right under the well deck.

"Q. Now, what was he doing? A. He was just lifting his ash pail, when the sea came over and sprayed the oil that was on the deck on to him.

"Q. How large was the deck? A. About as high as that [indicating]—two and a half feet high and eighteen inches in diameter.

"Q. Now, what did you notice? A. I noticed when the spray came because I made a dive for the bulwark. The next thing I saw it had got him and he doubled over on the rail, and the water struck his chest.

"Q. Could you see what part of his body was on the rail? A. I couldn't see exactly. I could see that he was doubled over the rail that is all.

"Q. How close was he to the rail before this water struck him? A. About a foot, may be.

"Q. That is the best you could tell? A. There is also a small kind of a narrow passageway, and one rail goes this way and one goes out that way [indicating], and he doubled over the rail on the after part, you see.

167 "Q. You mean one rail went forward and the other rail went out on each side to the corner where the two of them

neet, and that is the rail which runs across the afterpart of the hip's house? A. Yes.

"Q. Where did this water come from? A. Right along the hip's side straight from forward aft.

"Q. Which way was the sea coming? A. Dividing into head eas. She was going about a point to starboard.

"Q. What would you say was the condition of the water and the ea at that time? A. It was kind of a rough sea. There was a reeze.

"Q. Did she take any water over forward? A. There was lots f water on forward.

"Q. Did any of this water strike you that struck Lustgarten? A. Just a few drops, because I made a dive.

"Q. Did you observe whether or not there were any ash chutes here that he was using? A. No, there wasn't any.

"Q. Did you have any ash chutes on the ship? A. There was wo in the afterpeak.

"Q. Is there any place on the rail to attach these ash chutes? A. Yes, on each side.

"Q. How long have you been going to sea? A. About twenty-wo years.

"Q. Is it customary to use ash chutes to dump ashes from the alley overboard? A. As a rule they did so.

"Q. Did they have ash chutes attached to this vessel at any time luring the voyage? A. No; they never had them—not while I was aboard there.

"Q. You speak of some oil on the deck. What do you mean by hat? A. They have a circulation tank on the boat and they have to fill it up for the ship's fuel, and as far as I can make out 68 the engineers did not know how to work it, and every time they filled it up"——

Mr. LANDIS. If your honor please, I move to strike out that phase f the testimony, "as far as I can make out."

Mr. AXTELL. I have no objection to it, to striking it out. We will mit the rest of that down to:

"Q. Do you know whether Lustgarten did any work after this ccident? A. I do not think he did.

"Q. Do you know whether or not he did? A. I am not quite ure.

"Q. You can't remember? A. No; I can not remember.

"Q. Did you see him at any time after this accident? A. Yes.

"Q. Did you have any conversation with him? A. I just asked im how he felt and things like that.

"Q. At the time you saw him was he working? A. No.

"Q. Where was he? A. He was in the hospital in Ponta del Garda.

"Q. Do you know how long he was in the hospital? A. Until e got to Ponta del Garda, and they put to shore.

"Q. How long was he on the ship after this alleged accident? A. About ten or twelve days, or something like that; I am not quite sure."

Mr. LANDIS (reading):

"Cross-examination by Mr. McDONALD:

"Q. About what time of the day was it that he was hurt?

169 A. Either just before noon, or just before the afternoon, just between—inside of two hours, about.

"Q. How long had you been watching? A. I was coming along, you see, and I seen him double over.

"Q. Did you see him empty any ashes before that? A. Yes.

"Q. How many did you see? A. Sometimes it was slops and sometimes ashes, and sometimes I helped him myself—they were kind of heavy.

"Q. About how many were there? A. I couldn't tell you how many times. It was about two or three a day. You see, in the morning when they cleaned the fire out, and then there is some shops, and after dinner some more.

"Q. Did they usually dump them over the side of the ship at the same side? A. On the lee side always.

"Q. You say it was on the lee side? A. Yes, the lee side.

"Q. That is what the lee side is used for? A. Yes, and sometimes the port side.

"Q. Would you say the wind was blowing west toward starboard side of the ship? A. As far as I could recollect it was right ahead, but the vessel might have been going to a point to starboard, and that would bring the wind to the port side.

"Q. From what you say, it was probably on the lee side of the ship this day? A. That was the lee side; it was conceded to be the lee side. When the wind is dead ahead, the cook dumps his slops off the nearest rail.

"Q. Had he been dumping slops at the same point all that day? A. Yes.

"Q. Now you said the pipe laid out straight. You don't mean out horizontally?"

170 I will skip all that. Then beginning on page 12 again, speaking of the oil. [Continuing reading:]

"Q. Was it all over the deck? A. Not all over—just in spots—just enough for people to slip on; some came back in lumps and stayed there.

"Q. Did you state whether it was customary to have these chutes for galley slops? A. No, but I have seen them.

"Q. What is gained by the use of this chute? A. When they throw slops away it keeps the ship's side clean. It is easier to handle, and it doesn't have to hang on, you see.

"Q. How high does the chute come up? A. About 18 inches above the rail.

"Q. Did a wave hit Lustgarten at that time? A. Well, it was not exactly a wave—just a heavy spray.

"Q. And what was the effect of that wave on Lustgarten? A. He turned kind of sideways and doubled up.

"Q. It seemed to knock him down? A. Yes.

"Q. It knocked him against the rail? A. Yes. I think he slipped on oil, but I don't know, but there was some oil around.

"Q. You say here he slipped? A. Yes, I saw him slip, and he turned over on the rail.

"Q. After he struck the rail? A. Yes, after he struck the rail.

"Q. But you say here he slipped. A. I was down on the well deck and he was on the midship deck.

"Q. Then when you say he slipped, you got the theory you have, because of some oil on the deck? A. I think he slipped.

"Q. Had Lustgarten been sick in the early part of the voyage? A. No, not as far as I know.

171 "Q. I thought you said, in the early part of your testimony, that Lustgarten was not feeling well. A. Well, he didn't have anything to eat aboard her.

"Q. What rail did Lustgarten strike—the chain rail? A. Yes, the chain rail.

"Q. Do you know what part of Lustgarten's body came in contact with the rail? A. Can not tell you exactly. I saw him when he doubled up.

"Q. You didn't see him when he hit the rail. You saw him when he was doubled over? A. Yes.

"Q. Did you see him when he fell from where he was toward the rail? A. Yes.

"Q. What part of his body struck the rail, if you know? A. Somewhere across his body like this [indicating with his hand].

"Q. Now state again where you were when the sea came over the rail. A. I was abreast of the after mast when I saw the spray coming.

"Q. How far is that from where Lustgarten was? A. I can not tell you exactly; maybe about forty feet.

"Q. And when you saw the water coming you ducked off? A. I ducked underneath the rail.

"Q. And the deck that you were on was how far below the deck that Lustgarten was on? A. About seven feet.

"Q. Is the rail that you ducked under a solid rail? A. A solid bulwark."

Mr. AXTELL. I do not think I will read any more.

Mr. LANDIS. Page 21, and this is what I was looking for.

"Q. If you rig chutes of this kind, you would need one on each side? A. Yes, one on each side. The first time we put them
172 up a wave came along and knocked them away. It is no use to put them out.

"Q. Then if the weather was rough, it would not be wise to have them rigged? A. No, not if the weather is rough."

Mr. AXTELL. There is one more deposition, your honor, and I will omit as much of this as possible, gentlemen. It is the deposition of Edward W. Graff. [Reading:]

"Direct examination by Mr. S. B. AXTELL:

"Q. What is your occupation? A. Seaman, sailor, A. B.

"Q. How old are you? A. 29.

"Q. Where were you born? A. Boston, Mass.

"Q. What was your last ship? A. 'Artigus.'

"Q. What was your job on her? A. Bos'n.

"Q. Is that operated by the Shipping Board? A. Yes.

"Q. Do you know Lustgarten, the plaintiff who is sitting here?"

This deposition was taken quite recently, I think. The 16th of May, 1927. [Continuing reading:]

"A. Just the one trip.

"Q. When did you see him again after that? A. When he was coming here. He was getting off a train at South Ferry when we were going aboard, one night, that was when he came in on another vessel.

"Q. And you happened to meet him? A. Yes, we were taking the train.

"Q. When did you see him next? A. Just the other day.

173 "Q. Is he any special friend of yours? A. No, just a shipmate, that is all.

"Q. Do you know anything about an accident that occurred to him in the month of March?"

Mr. LANDIS. It appears that this man did not see any accident, and I objected to that question at the time.

The COURT. There is no answer. Next question.

Mr. AXTELL (continuing reading):

"Q. When did you first see Mr. Lustgarten on the ship? A. The day he came aboard.

"Q. Describe his physical condition? A. Pretty good to me; he carried his suit cases aboard without any trouble and brought them aft without any trouble.

"Q. And you seen him after that? A. Every day.

"Q. Did he go to England on the ship? A. Yes, he came to Manchester with us.

"Did you see him after leaving there? A. All the way around until we got Swansea.

"Q. Did he change his employment? A. Yes.

"Q. What change? A. A. B. to second cook.

"Q. What was his physical condition and appearance? A. Very good.

Q. You see this condition to-day. Any difference between his appearance now and then? A. Very much. Well, he looked a lot better, healthier, better complexion, and he didn't have no eyeglasses.

"Mr. AXTELL. Take off your eyeglasses, Mr. Lustgarten.

"Q. Look at him without his eyeglasses. What difference do you see?

174 "A. Much different complexion and his eyes are practically shut and they were open then.

"Q. Did he blink his eyes then as he does now, continually? A. No.

"Q. How about the size, his size, and weight as compared with the present and before the accident?

"A. Well, height about the same, but he must have weighed about 10 or 15 pounds more than he does now.

"Q. He was then? A. Yes, filled out more in the face.

"Q. Tell me of any occurrence you know or saw on the ship with regard to Lustgarten on the way home from Manchester. A. In what respect?

"Q. Well, do you know of any change in his physical condition on the way home? A. Not until after the accident."

Mr. LANDIS. I move to strike that answer out, because this witness did not see the accident.

The COURT. What page is it?

Mr. LANDIS. It is on page 6.

Mr. AXTELL. He does not pretend that he saw it.

Mr LANDIS. It makes the appearance that all these men were actual witnesses to the accident, which is not true. They only have two men who saw this accident.

The COURT. Which is the question?

Mr. LANDIS. I move to strike out the answer about a third of the way down the page, "Not until after the accident." The question is, "Well, do you know of any change in his physical condition on the way home? A. Not until after the accident."

175 The COURT. He may answer.

Mr. AXTELL. We have proven it was an accident, and this is only used to fix the time.

Mr. LANDIS. No, there is a question in dispute.

The COURT. You need not argue it; I have ruled on it.

Mr. AXTELL. I did not get your ruling, your Honor.

The COURT. I will take the answer.

Mr. LANDIS. May I have an exception, if your Honor please?

Mr. AXTELL (continuing reading):

"A. Not until after the accident.

"Q. What accident do you refer to? A. Accident by the sea.

"Q. What do you know? A. I came up there as the man was coming out of the hospital"——

Mr. LANDIS. I am going to move to strike the rest out.

Mr. AXTELL. It might be considered parts of the rest, I suppose.

The COURT. There is no evidence that he saw any accident. He says he did not, gentlemen, but is telling how the matter came about that he heard of the accident. I will take it for what it is worth.

Mr. AXTELL (continuing reading):

"A. I came up there as the man was coming out of the hospital and he said a man was hit.

"Q. Did you see Lustgarten after at the hospital? A. Yes.
"Q. Did you see him before? A. What?
"Q. Did you go into the hospital? A. I did.
176 "Q. Did you see Lustgarten? A. I did.
"Q. What was his condition? A. He was lying on the bunk and looked like he was in pain.
"Q. Did you notice anything about his face or head? A. I didn't pay any attention.
"Q. Did you at any time after that notice anything? A. Yes, a day or two later I was in the galley and he was mixing bread and I was talking to him and he had a coughing spell and vomited a clot of blood into the bread and I also seen him later on and his face was swollen all around here (near chin and mouth) practically from ear to ear.
"Q. Do you know how long he was laid up in the hospital? A. One or two days, I am not sure.
"Q. Did you see any occurrence between him and captain? A. No, sir.
"Q. Any conversation? A. No, sir.
"Q. How was the weather on the day that you saw him in the hospital? A. Pretty bad, in fact it was bad the whole trip.
"Q. Did you steer the ship? A. Yes, sir.
"Q. Did you steer on the way over? A. Over and back, both ways.
"Q. How did she steer going over? A. Fairly good.
"Q. How coming back? A. Very bad.
"Q. Do you know anything about any water being in the afterpeak? A. Afterpeak was loaded and so was the lazarette, to about six feet.
"Q. How do you know that was so? A. I seen it.
"Q. When did you first see it? A. In Swansea.
"Q. Before sailing? A. Yes.
"Q. How long before? A. Three or four days.
"Q. And you knew it was leaking in the aft peak before you sailed? A. Yes."
177 "Q. Was any protest made in your behalf by any members of the crew? A. Yes; the mate was notified and so was the captain.
"Q. What is your knowledge? A. I was down there with the chief and he said stern gland leaking.
"Q. What is that? A. Some with the rudder.
"Q. Packing around rudder? A. Yes.
"Q. Will you repeat what you heard at this time? A. The lazarette?
"Q. About the leak between the engineers' and the deck officers that you spoke of."

Mr. LANDIS. Where are you now?

Mr. AXTELL. At the top of page 10.

Mr. LANDIS. Well, you skipped some thing.
Mr. AXTELL. Did I?
The COURT. I think not.
Mr. AXTELL. No, I read it all.
Mr. LANDIS. Did you read this part [indicating]?
The COURT. I followed it right along. I think he read everything.
Mr. AXTELL. I did not read it?
The COURT. Yes, I think you did.
Mr. AXTELL. Certainly I did. [Continuing reading:]
"Q. About the leak between the engineers' and the deck officers that you spoke of. A. I was down there with them and they claim——
"Q. Who? A. First assistant and chief engineer.
"Q. Any other officers there? A. I believe the mate was there, I wouldn't say for sure.
"Q. What did you hear said? A. That the stern gland——
178 "Q. Who said that? A. Chief to first.
"Q. Was the captain there or on shore? A. He must have known because I saw him and the mate looking at it one day before he left.
"Q. Did you make any protest or was any protest made to the consul on behalf of the crew?"
Mr. LANDIS. I object to this question, if your Honor please, the second part of the question. I do not object to the first part. "Did you make any protest," but I object to the second part as calling purely for hearsay.
The COURT. The rest of it is purely hearsay because he was not there. I sustain the objection.
Mr. AXTELL (continuing reading):
"Q. Have you made any statement in this case before today? A. No.
"Were you approached by a representative of the defendant with regard to giving your testimony? A. Yes."
Mr. LANDIS. I object to that. What is the difference? It does not matter, but what is the point?
Mr. AXTELL. If you have a valid objection, make it.
Mr. LANDIS. Then I make the objection.
The COURT. I will sustain it as immaterial.
Mr. AXTELL (continuing reading):
"Q. Were you given any subpoena?" Do you object to that?
Mr. LANDIS. We object to that, yes.
Mr. AXTELL. The picture down there that he referred to has been identified. [Continuing reading:]
179 "Q. Is that a picture of the 'Coelleda'? A. It is."
Mr. LANDIS. We will concede it is.
Mr. AXTELL (continuing reading):
"Q. What are those holes in the rail?"

Mr. LANDIS. If your honor please, I am going to object to that question until such time as it is shown that he knows what those holes are.

Mr. AXTELL. It is obvious. This picture is Exhibit No. 5.

Mr. LANDIS. There is no reason under the sun to suppose that those are for the disposal of ashes.

The COURT. Objection overruled.

Mr. LANDIS. May I have an exception?

Mr. AXTELL (continuing reading):

"Q. What are those holes in the rail? A. They are to make ash chute fast with vessel."

Mr. LANDIS. If your honor please, he admits in the last part of his testimony that he never has seen an ash chute on a Hog Island ship, and how he knows these holes in this particular plate are ash holes, I do not know.

The COURT. If he admits that he did not know what he was talking about and you develop that subsequently, you must credit the jury with some intelligence.

Mr. AXTELL (continuing reading):

"A. They are to make ash chute fast with vessel.

180 "Q. Have you seen them on other vessels? A. Not on Hog Island vessels.

"Q. How do you know? A. It is sort of punch where she is made fast with rail.

"Q. Have you seen such chutes on other vessels? A. Not that type; they usually have them after, over stern.

"Q. Why do you say they are for ash chute then? A. It hooks over this square and then hooks over like this [witness demonstrates with piece of paper].

"Q. If you haven't seen them on other Hog Island vessels, how can you tell? A. I was told by other persons who had seen them before."

Mr. LANDIS. I move to strike out all concerning the holes in this thing. It is obvious that that is improper testimony and founded purely upon hearsay.

The COURT. He was on the ship, wasn't he?

Mr. LANDIS. But he admits never having seen these ash chutes up, and it is only what people told him.

The COURT. He says it hooks over.

"Q. If you haven't seen them on other Hog Island vessels, how can you tell? A. I was told by other persons who have seen them before."

The COURT. I will let it stand.

Mr. LANDIS. May I have an exception?

Mr. AXTELL (continuing reading):

"Q. Were those holes there on this trip? A. Yes.

"Q. That is a view of which side of the ship? A. Port.

"Q. I show you another picture and ask you what is that picture:

181 I won't press these questions, because we have already gone over these pictures, and the same ones are in evidence. I won't press the question. Just this question:

"Q. What is distance between outside rail and the house?" That is at the bottom of page 13.

"A. 18" or 2'.

"Q. In order to dump ashes over there is it necessary to go through that rail or over it in some way? A. Yes."

Mr. LANDIS. I object to that on the ground that it calls for an opinion.

The COURT. Sustained.

Mr. AXTELL. I will omit the rest of page 14. Question at the top of page 15:

"Q. How did the 'Coelleda' steer on the way from Swansea? A. Very bad.

"Q. That is an expression that counsel can object to on the trial and the objection very likely will be sustained. If you will explain in detail how she steered so a judge and jury will understand, it will be better. A. You couldn't keep her within point or point and a half of her course unless you watch her pretty carefully."

Mr. LANDIS. I am going to object to this because I believe it is immaterial how that vessel steered at any time.

The COURT. Objection sustained.

Mr. AXTELL. Exception. [Continuing reading:]

"Q. What time was this you saw him in the hospital? A. After supper, between 5.30 and 7, I am not certain.

182 "Q. Who was on the wheel at the time? A. I am not certain.

"Q. Do you know which A. B.'s were on duty at that time? A. Voogd was one, that is 4 to 8 watch and a Frenchman, I can't remember.

"Q. Do you know where the seas were on that day or the lee side of the ship for instance? A. I couldn't testify because they were pretty near dead ahead a little on the starboard.

"Q. If the ship veered a little in steering what would be the effect of seas coming aboard at points aft of the bridge? A. There is a possible chance of seas coming aboard aft of the bridge."

Mr. LANDIS. I am going to object to that, if your honor please, on the ground that it calls for an opinion and calls for an opinion of an expert witness, and in any event it is immaterial.

The COURT. Objection overruled.

Mr. LANDIS. May I have an exception?

Mr. AXTELL (continuing reading):

"A. There is a possible chance of seas coming aboard aft of the bridge.

"Q. Well, did you observe any time on this trip from Swansea how the seas come on?"

Mr. LANDIS. I object to that, if your honor please, on the same grounds. Its immateriality is a little more apparent, in that it does not matter what he observed during the trip, except on this particular day and at this particular time.

The COURT. Objection overruled.

Mr. LANDIS. May I have an exception?

Mr. AXTELL (continuing reading):

183 "A. Fairly regular at times.

"Q. Which side? A. Both sides.

"Q. Which deck? A. As far as the bridge deck.

"Q. Is the bridge deck above this deck on which this ash chute is located? A. Same deck.

"Q. You were, as wheelsman, above that deck steering? A. Yes; a little higher than that.

"Q. Two decks above it? A. No; two; well, yes, you could call it two.

"Q. Did you see seas come aboard on this ship? A. Yes; plenty.

"Q. How deep? A. Practically a foot all the time forward.

"Q. On the well deck one deck below, on which this is on? A. Yes."

Mr. LANDIS. Your honor, may I continue to object to all these questions as immaterial?

The COURT. You may.

Mr. LANDIS. I particularly want to object to this one.

Mr. AXTELL. Which one?

Mr. LANDIS. These three regarding the seas coming aboard the boat, as being immaterial. Seas come aboard a ship forward, of course, in any heavy weather.

Mr. AXTELL. Its shows whether she is overloaded or not.

Mr. LANDIS. It certainly does not. Did your honor make a ruling?

The COURT. Do not talk back and forth between yourselves. I said you could object to anything that you like. I have already ruled, and you have an exception.

Mr. LANDIS. Exception.

The COURT. Next question.

184 Mr. AXTELL. An exception is not required in this court, is it, your honor, if we make the record?

The COURT. We raised that without an exception.

Mr. AXTELL (continuing reading):

"Q. Did you see any water on the midship deck on the day of the accident? A. I'm not sure, but I think there was water there every day, a spray or so up there.

"Q. How was the ship as to load? A. Trifle by the head when she left Swansea.

"Q. Fully loaded or not? A. I believe she was.

"Q. What was she loaded with? A. Coal and building stone.

"Q. How many days out of Swansea was she when the accident occurred? A. I don't recall.

"Q. You didn't see any accident, did you? A. No, sir.

"Q. You never said to anyone that you did see an accident, did you? A. No, sir.

"Q. After she got out to sea did you notice any difference as to her being down by the head or down by the stern? A. Down by the head for a day or so until they lightened her up.

"Q. How was she at the time that you saw this boy in the hospital? A. You couldn't tell this because she was pitching and rolling.

"Q. Pitching and rolling? A. Yes.

"Q. How much was she rolling? A. Not so much, more pitching than rolling.

"Q. Did any seas come aboard astern? A. A few over on the after well deck.

"Q. Well, did you observe whether or not when the vessel got off her course a bit in straightening out she would roll more than at other times?"

185 Mr. LANDIS. If your honor please, I object to this question.

The COURT. I will take it.

Mr. AXTELL (continuing reading):

"A. She would, yes.

"Q. That is true of any ship in any weather, is it not? A. Not necessarily.

"Q. Well, if you got her off her course and tried to get her up? A. In steadying her.

"Q. Did this ship on the day of the accident get off her course any?"

There is an objection there.

"Q. Did she on such occasions roll to one side or the other? A. Both ways.

"Q. Do you know whether seas came aboard her when she rolled? A. Yes, the side that she tipped more.

"Q. Do you know whether the water in her aft peak had anything to do with her bad steering, as you call it?"

Mr. LANDIS. I object to that as calling for an opinion.

The COURT. There is no need of objecting; there is no answer.

Mr. AXTELL (continuing reading):

"Q. How long have you been steering? A. 11 years.

"Q. Have you been steering 11 years? A. No, been to sea 11 years.

"Q. How long have you been steering? A. Since 1920.

"Q. You been going steady all that time? A. Well, off and on just a week off from time to time.

186 "Q. You haven't done anything else? A. No, nothing else.

"Q. Were you ever in that lazarette hatch? A. Yes.

"Q. Any time to see what was going on or what was in there? A. Yes, shelves loaded with towing wire and large-size tackle.

"Q. Did the vessel put into Azores? A. Yes.

"Q. Do you know why? A. For oil and water.

"Q. Did she get fresh water there? A. Yes.

"Q. What was the occasion? A. On account of the aft peak.

"Q. On account of what? A. Water was spoiled down there on account of the leak."

I suppose they mean fresh water spoiled.

"Q. Do you know what the situation was? A. The leak did everything.

"Q. The leak wouldn't spoil the water, would it? A. Well, the things that were rolling through the main hold knocked off the top of the tank and allowed salt to get in.

"Q. What made it come off? A. All this junk.

"Q. What junk? A. Tackle, etc.

"Q. Did you look into the place after this? A. Yes.

"Q. What did you see? A. Nothing but a whole mass of wire and a ladder stored away.

"Q. How big was this wire? A. I believe—

"Q. How big a wire? A. Stood 6' high when it was in a roll.

"Q. Did you see the manhole cover?"

The COURT. Does this concern the accident?

Mr. AXTELL. I guess it comes under a ruling your honor made yesterday. I won't press it. [Continuing reading:]

187 "Q. Did you see Lustgarten again after that time in the galley when you seen him and he was spitting blood up? A. Yes.

"Q. What did you notice about him? A. Swelling face and looked kind of down and out.

"Q. Did he continue all the way? A. All the way, no, only to the Azores.

"Q. Did you see him when he left? A. No.

"Q. When before did you see him? A. The day before.

"Q. How did he look then? A. Same appearance, down and out.

"Q. Was he working, do you know? A. I don't remember.

"Q. Don't remember? A. No, sir."

Your witness:

Mr. LANDIS (reading):

"Cross-examination by Mr. LANDIS:

"Q. How many days after you saw him in the hospital did you see him in the galley? A. Two days later.

"Q. Was the chief cook there at the time? A. He was.

"Q. Do you know if they used the dough he spit in or not? A. No, they destroyed it.

"Q. Do you recall seeing Lustgarten in the galley after this time? A. You mean the time he spit the blood?

"Q. Yes. A. Yes.

"Q. How many times? A. Two or three days later.

"Q. He was working at that time? A. No, just there.

188 "Q. You don't recall seeing him work after that? A. I seen him two or three times working in there.

"Q. But you don't recall at this time whether that was before you saw him or after? A. After he was in the hospital.

"Q. Was that after the other times you saw him working, after the time he spit the blood in the dough? A. After, yes.

"Q. Did you say anything to any officer about that? A. No, sir.

"Q. Did you ever hear the chief cook tell the officer about it? A. No, sir.

"Q. Did you ever see him spit blood after? A. Just that one time.

"Q. Lustgarten wasn't unconscious at the time you saw him? A. Not what you really call unconscious, but he didn't have anything to say.

"Q. You didn't carry Lustgarten to the hospital? A. No, sir, I just got there right after.

"Q. I believe you testified in the direct examination that his complexion is not the same as when he was aboard that might be due to the fact that he hasn't been to sea recently? A. I couldn't say.

"Q. It is quite conceivable though? A. I don't know.

"Q. You testified that way more to-day than at sea? A. No, more at sea than he does to-day.

"Q. Of course, this was more than a year ago and you are just making a guess? A. No, I can see by his general appearance.

"Q. Did you ever see anybody give Lustgarten any medical treatment? A. I believe the second mate, Abbott, did.

"Q. He did go and give him some treatment? A. Yes.

189 "Q. Did you have any conversation with him after the time you saw him in the hospital? A. I used to see him fairly regular.

"Q. Did he ever say anything to you about a broken finger? A. No, sir.

"Q. You don't know how deeply loaded that ship was, do you; that is, about her marks? A. Right down to her marks.

"Q. How much below was she going to England? A. That I would never know.

"Q. Well, in your experience, is it more difficult to steer a ship loaded down in heavy weather than if she wasn't loaded so deeply? A. Yes; worse when she is heavier.

"Q. That might account for the more difficult steering coming back than going over? A. Yes.

"Q. Did you look in the lazarette every day? A. Yes; that was part of our job.

"Q. Did you personally? A. Yes.

"Q. Every day? A. Yes.

"Q. To whom did you report? A. To the officer on watch.

"Q. What watch did you make your inspection? A. 12 to 4.

"Q. And you reported to the officer? A. Yes.

"Q. Always the same officer? A. Yes.

"Q. Who was it? A. Abbott.

"Q. You told Abbott that there was 6′ of water in the lazarette? A. Yes.

"Q. Every day? A. Yes.

"Q. Didn't it become worse just prior to the time you turned around and went to the Azores? A. Not noticeably.

"Q. Of course, a ship in high seas pitches and rolls? A. Not always.

"Q. When ship will have sort of corkscrew motion? A. Not that, mostly pitching, but she will move over a bit and then back.

190 "Q. She will? A. Yes.

"Q. You had some less severe weather on some days than on others? A. Yes; but not much.

"Q. There were days when water wasn't even over forward deck? A. Not much.

"Q. You said that sort of got the ship trim at sea? A. Seemed that way.

"Q. Sort of even keel, is that it? A. Yes.

"Q. You didn't yourself have any trouble with her steering? A. Always had trouble.

"Q. You had to watch it? A. Well, within point and half.

"Q. How many degrees is that? A. 16°.

"Q. That would be natural consequence of ship coming over with seas striking it? A. What do you mean?

"Q. It would be natural consequence that ship would come over when she was riding big sea? A. Just become unmanageable.

"Q. That is consequence of deep seas and heavy loading, isn't that true? A. Pretty hard to manage; just wouldn't stay there, that's all.

"Q. At the time you talked with Lustgarten after the time you saw him in the hospital did you see any marks or bruises on his shoulders or back? A. Never saw him stripped.

"Q. Any other marks? A. Only swelling over left ear to right ear, looked liks toothache.

"Q. Like a toothache? A. Yes.

"Q. That is only mark? A. Yes.

"Q. I take it you had opportunity to see him and were standing face to face with him? A. Yes.

"Q. Did he complain to you at any time that he had anything in his eye? A. Not that I remember.

"Q. Ever see him wiping ashes out of his eye? A. No."

191 WILLIAM TYBURSKI, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. What is your occupation? A. Seaman.

Q. How old are you? A. Twenty-four.

Q. Where were you born? A. In Massachusets—Chicopee, Massachusetts.

Q. How long have you been going to sea? A. About five years.

Q. Were you a member of the crew of the "Coelleda"? A. Yes.

Q. Where did you join her, and when? A. I joined her in Baltimore.

Q. Did you make one or more trips on her? A. I made two trips on her.

Q. Did you know Lustgarten, the plaintiff sitting over here [indicating]? A. Yes, sir.

Q. Which trip, as to your voyages, was he on? A. The second trip.

Q. Did you ever see him before that time? A. No, sir.

Q. Describe his physical condition when you first saw him, that you recall, on the ship? A. When I first seen him on the ship in Baltimore, he joined her.

Q. How did he look at that time? A. He was in perfect condition, just as good as I am now.

Mr. LANDIS. I move to strike out that answer. Let him describe the man's physical appearance.

Q. Well, how big was he, and how much did he weigh, in
192 your estimate? Did you ever see him with his clothes off before the time that he got hurt? A. The only time I seen him with his clothes off was during the trip, whenever he took a bath.

Q. Did you ever see him before the accident? A. Yes, sir.

Q. Describe his physical condition, as to the muscles and build and appearance, as to strength, weight, and so forth, prior to the 5th of March, 1926. A. Well, when I see him I seen nothing the matter with him; he looked healthy.

Q. How about his color? A. He was not as pale as he is now; he had a reddish color more to him, more reddish tint to his face, more red color to his cheeks, and everything all the way round.

Q. How about the fullness of his cheeks and flesh? A. It was more full at the time, more solid.

Q. How about his weight now and his weight then? A. That is hard for me to say, but I believe he weighed more at the time than he does now.

Q. Did you see this accident? A. Yes, sir.

Q. I beg your pardon? A. Yes, sir.

Q. Where were you at the time? A. I was just outside of the galley, in the passageway, about 10 foot away from where the accident occurred.

Q. What watch were you on? A. On the 12 to 4 watch.

Q. That is, you worked from 12 to 4 that day? A. Yes, sir.

Q. And from 12 to 4 the next morning? A. Yes, sir.

Q. And you were off duty then from 4——A. (Interposing.) Until 12.

Q. Until 12. When did this accident occur? A. It happened some time during the day. I do not just exactly recall it. I could not say.

193 Q. Well, what did you see at the time? A. Well, I was standing over there talking to a couple of men, outside of the galley, and all of a sudden I felt the ship give a lurch like, and then kind of spray seemed to come around me, so I looked around and seen Lustgarten with the can he was carrying at the time. The

can was gone and Lustgarten was just laying off the rail, slipping on to the deck.

Q. What did you do? A. So I went over there with another man; went over there and helped him to his room.

Q. What was his condition? A. Well, when I picked him up there was blood coming out of his mouth and nose, and it was streaming down him.

Q. What did you do with him? A. I took him to his room.

Q. And did you see him after that? A. I seen him later after that; yes, sir; the next day.

Q. Did he receive any attention from any of the officers after that? A. I could not say, sir, because after I brought him in the room I stepped out and went outside into the forecastle.

Q. How was the weather that day? A. It was a rough sea.

Q. How was it at the time you left your watch at four o'clock? A. She was rough that day and she was——

Q. (Interposing.) In the afternoon? A. In the afternoon she was bad. She was the same pretty near day in and day out.

Q. How did she steer? A. She steered very bad, sir.

Q. Well, describe it. Imagine yourself upon the bridge with the wheel in front of you; tell us how the wind was hitting and how the seas looked, and how the ship steered, how she acted to the helm at that time, when you left the watch at four o'clock, before this accident.

194 Mr. LANDIS. If your Honor please, I am going to object to this on the ground it is immaterial.

The COURT. How many other witnesses have you got, Mr. Axtell?

Mr. AXTELL. Just one.

The COURT. Did he see the accident?

Mr. AXTELL. The other witness? No.

The COURT. Then I will sustain the objection.

Q. Do you know how she was heading at the time of the accident? A. What do you mean by that, sir?

Q. Her direction. Well, I will say this: Do you know how she was heading as to the wind at the time of the accident? A. Well, the wind was from about the northwest, I believe, and she was hitting a little over to starboard; about a point off the starboard bow.

Q. Which side did this accident occur on? A. The accident occurred on the port bow—the port side.

Q. Would that ordinarily be the lee side? A. It would be the lee side.

Q. If she was steadying off the course? A. If she was steadying?

Q. Where did the sea come from, fore or aft? A. It came from the fore part of the ship.

Mr. LANDIS. I would like to know if he saw this sea. All he said is that he saw some spray, and saw it after it came over.

The COURT. Is that all you saw, some spray?

195 The WITNESS. No; the spray hit me. That is what I felt when I was out by the galley. You see, I was not actually looking at the man when he was dumping the ashes.

The COURT. Is that the only wave you saw, the spray of which hit you?

The WITNESS. No, I seen the water on the deck. If the spray could hit me, there was a lot come over the deck at that time.

The COURT. You did not see any?

The WITNESS. No, I did not, but later in the day I noticed the sea used to come over the well decks there.

The COURT. You did not see any wave hit Lustgarten?

The WITNESS. I did not actually see the wave hit him; no, sir.

Q. What was the condition of his clothing when you carried him in? A. His clothes were wet.

Q. Did you see water on the after bridge, midship deck, at the time of the accident? A. Yes, sir; there was water there.

Q. How much water? A. Well, she was right running over the top of the coaming there.

Q. The spray hit you and you ducked, is that it? A. Yes, sir; I ducked right around the galley there.

Q. Then what did you see next? A. Then I seen Lustgarten right on that rail, just slipping off.

Q. Did you see any water at that time? A. Yes, there was water on deck.

Q. How deep was it? A. Well, about six inches or seven inches, right to the coaming.

The COURT. What do you mean by that? Water does not stay on the deck six or seven inches.

196 The WITNESS. You see, there is a coaming comes up right to the rail, and, you see, that water has to go down through——

The COURT. You mean there was some water running down off the deck?

The WITNESS. It was running down.

The COURT. But six inches, the deck was not covered with six inches of water, surely, was it?

The WITNESS. Well, that is only a passageway there.

The COURT. I want to know what you mean. Where was the six inches of water.

The WITNESS. It was right on the deck there.

The COURT. In the scuppers or where?

The WITNESS. Right by the scuppers, but she was not taking it fast enough through the scuppers at the time. You see, right alongside there is a house, right alongside, and the wave that must have come must have hit that house and come around that house, and just dropped down.

The COURT. You did not see any wave.

The WITNESS. No, but it must have been a wave——

The COURT. What you saw was some water in the scuppers; is that it? A. I saw the spray, and it hit me, and I was 10 foot away in the galley.

The COURT. What water did you see on the deck?

The WITNESS. Well, the water was on deck there, the water that come from——

The COURT. Was it six inches deep on deck?

197 The WITNESS. Yes, sir.

The COURT. Where was it on that deck?

The WITNESS. You see, the scuppers is right here, sir [illustrating], and that is the side of the house. The wave must have hit the side of the house, and the water shoots over this way, you see, and this coaming is about six inches, and it goes right over it. I was here towards the galley [illustrating].

Q. Will you show the jury, Mr. Witness, where you saw the water, using Exhibit No. 5 to illustrate. A. You see, this is the outside of the house over there, and this is the passageway. I was over right here at the house, the galley, and the water must have hit on that side and came this way, and hit this way and dropped over there. That is where she was about six inches high.

Q. All right. A. You see, the scuppers was not taking it fast enough.

Q. Was there any ash chute at that place, at the port side, where you saw this boy at the time of the accident? A. No, sir; there was not.

Q. Had there been any ash chute during the trip, that you know of? A. Not that trip; no, sir.

Q. Had they had any other on any other trip? A. The day before they had one up, and they took it down again.

Q. What kind of an ash chute was it? A. It was a steel ash chute, or an iron one.

Q. Will you tell the jury how it was secured to the deck of the ship, using this photograph to illustrate [handing witness]? A. She was secured right here. The ash chute was held with a bolt

198 down here, and the ash chute rests right on here, and the ash chute was between this rail. It is between two rails.

Q. The bottom of it was bolted, with five bolts, and it was secured by hooks over that rail; is that correct? A. Yes.

Q. How thick was the metal of that chute? A. Oh, I don't know; about half an inch of it.

Q. Well, was it a heavy ash chute? A. It was kind of a heavy ash chute.

Q. A heavy contrivance. Have you seen other ash chutes on other vessels? A. Yes, sir.

Q. Do you know from your experience whether they are in general use as part of the equipment and appurtenances of a steam vessel?

Mr. LANDIS. If your honor please, I object to that as immaterial.

The COURT. You have not shown that they had an ash chute on those vessels.

Mr. AXTELL. It is shown that they did not have it up.

The COURT. You do not mean to contend seriously that a ship carries that thing all the time?

Mr. AXTELL. Absolutely.

The COURT. I will have to see some evidence of that. I will take the testimony.

Mr. AXTELL. The only time that they do not use it is when they are in port.

The COURT. You put in the testimony first before I will take that.

The WITNESS. Pardon me, your honor, could I say something on that?

The COURT. No; you may not. You will answer the questions.

199 Q. Did you see this boy after the time that you left him in the hospital during the trip? A. During the trip I seen him; yes, sir, off and on. I used to go along and see how he was making out.

Q. What was his condition? A. Well, when I seen him a few times there he used to be always kind of bad breathing and kind of choking and spitting out, and when he spit out he would spit out blood, like.

The COURT. Isn't this cumulative?

Mr. AXTELL. They claim that this man is a malinginer and a faker. That is their whole defense.

The COURT. Until they dispute it I will not take it, and will give you an exception.

Q. Did you notice his condition after he left the ship, as to his weight, or at the time he left the vessel at the Azores, his general appearance then and before the accident? A. Well, when he left the ship in the Azores I was in the forecastle, sir.

Q. What? A. I was in the forecastle when he left at the Azores.

Mr. AXTELL. Your witness.

Cross-examination by Mr. LANDIS:

Q. Your testimony has be'n taken by deposition, has it not, in this same matter, before? A. Yes, sir.

Q. It was taken by Mr. Axtell at his office? A. Yes, sir.

Q. And the date when that deposition was taken was in September, 1926, is that true—approximately that time, last fall? A. May be.

200 Q. Where exactly were you standing at the time that this accident is supposed to have occurred? A. I was standing right outside the galley. About 10 foot away from where he was.

Q. Were you standing there at the time that he brought this ash pail out from the galley? A. Yes, he was driving it along the deck.

Q. Did he pass you in the course of that passage? A. Yes, sir.

Q. He did? A. He did.

Q. Unfortunately, you did not hear Mr. Lustgarten testify yesterday that he did not pass anybody on his way there.

The COURT. That comment is unnecessary. Put the next question.

Q. What passageway is it; was it the passageway running fore and aft that you were standing in, or athwartships? A. The one

running fore and aft. I was right at the break of the one running athwartships.

Q. Then you were inside the superstructure, inside the house, were you not? A. No, I was right on the corner of the one running athwartships, and the one running fore and aft.

Q. You testified when your deposition was taken that you were in the passageway running fore and aft. A. Well, I could be a foot either way.

Q. You were inside, were you not? A. I could not exactly say.

Q. How wide is that passageway, do you know, running fore and aft? A. I don't know, about four or five feet.

Q. It is about three feet, is it not? A. Oh, I mean the width.

Q. About three feet, isn't it? A. No, it is about four or five feet. It might be.

201 Q. You could not seen from where you were standing, inside that passageway, what was taking place at the corner of the house, the edge of the ship, could you? A. I could see.

Q. How could you? The house was in the way, was it not? A. It was not. I was at the break of the athwartships passageway and the one running fore and aft, right at the break.

Q. Why didn't you state that when you testified before? A. I did. I was standing right there.

Q. You stated you were standing in the passageway fore and aft? A. Well, I can be a foot either way there. I can be standing in that one and can still see around the corner.

The COURT. The question is where you were standing, and why you say you were standing where you did say you were standing—how you could be where you were.

The WITNESS. That is right where I was.

Q. That is inside the house, is it not? A. It is not. I was at the break of it. I might have been a foot or two inside of it. Show me a true picture.

Q. [Indicating to witness.] This is the house, isn't it? A. That is it right there. There is the galley and there is the house, and I was standing right there [indicating]. I was right at the break of it, right here. That is about 4 or 5 feet wide.

Q. You were not outside in the passageway athwartships, were you? A. No; I was not outside of it; no. I was at the break of it.

Q. The mess room is between you and where Mr. Lustgarten dumped the ashes? A. The galley is a little further than this room here, out.

202 Q. That passageway athwartships is an even passageway all the way across, is it not? A. Yes.

Q. Is that a picture of that section of the "Coelleda" [handing witness]? A. That is the outside section.

Q. That is the outside passageway, isn't it? A. No; that is not a passageway. That is outside of the ship. The passageway is inside.

Q. Yes; I know, but this is where Lustgarten was dumping ashes, isn't it; this is the after end of the amidship house, isn't it [indicating]? A. That is the starboard side.

Mr. AXTELL. I object on the ground that he is questioning the witness about some things that are not in evidence.

The COURT. Objection overruled.

The WITNESS. That is not the port side of the ship.

Q. You do not know what side it is. This is the after end [indicating]. A. This is the after end, and that must be the starboard side of the ship.

Q. You do not know anything about photography. You know that the opposite side of the picture is necessarily the opposite side from the way the eye visages it. Be that the starboard or port side does not matter. This is the after end of the amidship house, isn't it [indicating]? A. I know, but that is the starboard side.

Q. Well, let it be the starboard side; it is the after end of the amidship house, answer the question yes or no. A. Yes.

Mr. LANDIS. I offer this picture in evidence.

The WITNESS. That is a side view [indicating].

The COURT. What do you offer it for? It does not represent the scene of the accident according to the testimony of this witness.

Mr. LANDIS. It is the after end of the amidship house, your honor.

The WITNESS. It is the side of the house.

The COURT. It is the other side of the house.

The WITNESS. That is the outside of the house.

Q. You said the galley stood out further than the mess room? A. That is the opposite side.

The COURT. We do not care what you may think about it; that does not make the paper admissible. You asked the witness a question to contradict him, on the theory that you are right and he is wrong. Now go on with your next question, please.

Mr. LANDIS. This is the picture that he says is the starboard side of the ship [handing counsel].

The COURT. Please go on with the proof; you are simply wasting time talking together.

Q. Who assisted you to take Lustgarten to his cabin? A. What is that?

Q. Who assisted you to take Lustgarten to his cabin? Well, at the time I gave testimony I figured it was Graff; I may have been mistaken.

Q. Graff's deposition has since been taken and he denies carrying Lustgarten to his cabin; is that it? A. He denied that it was so, so it must not have been him, but I figured it must have been him. It was somebody.

Q. You and Graff stood the same watch, did you not? A. Yes, sir.

Q. You knew Graff very well? A. I knew him as a watch mate; yes, sir.

Q. Is it like Graff to say that he did not help to take him to the room if he did? A. Yes, I know, but I can not remember things that happened, seven or eight months later.

Mr. LANDIS. May, I reserve a little time for further cross examination, your honor, depending upon what they develop here?

The COURT. Finish your cross-examination. We will never get done.

Mr. AXTELL. I want to ask a question about the loading of the ship.

The COURT. I am going to stop this trial. Go ahead.

Mr. AXTELL. There is one question:

Redirect examination by Mr. AXTELL:

Q. Mr. Tyburski, did you notice the Plimsoll mark on this vessel? A. Yes.

Q. Describe the appearance of the Plimsoll mark.

The COURT. No; I have ruled on that. It is immaterial. Unless you want to prove something else, as to where this accident happened, I will deny that.

Mr. AXTELL. I want to prove its loading.

The COURT. I have ruled on that.

Mr. AXTELL. I will ask this one question for the record, and that will cover it.

205 Q. Did you see the Plimsoll mark, whether it was above or below the waterline at the time the vessel left port at Swansea?

Mr. LANDIS. I object to the question.

The COURT. Objection sustained.

Mr. AXTELL. Exception.

The COURT. Unless there is further proof as to the happenings of the accident.

Mr. LANDIS. Just a couple more questions.

Recross-examination by Mr. LANDIS:

Q. You were not standing in the passageway in the after end, were you? A. I was standing in the passageway.

Q. Answer my questions. You were not standing out there, were you? A. No, sir.

Q. You were standing inside the house, weren't you? A. Yes, sir, about a foot inside of the house.

RUDOLPH TOMAZIN, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. What is your occupation? A. Seaman.

Q. How old are you? A. Twenty-two.

Q. Where were you born? A. Ohio.

Q. How long have you been going to sea? A. Four years.

Q. Were you a member of the crew of the steamship "Coelleda"? A. Yes, sir.

Q. In what capacity? A. Ordinary seaman.

Q. How many trips did you make on her? A. Two.

206 Q. Do you know the plaintiff Lustgarten? A. Yes, sir.

Q. Do you know the last witness Tyburski? A. Yes, sir.

Q. Did you see the accident to Lustgarten? A. No, sir.

Q. Did you see him on the day of the accident? A. Yes, sir.

The COURT. Is this merely as to the position?

Mr. AXTELL. As to the treatment. This man was in the hospital.

The COURT. He was there?

Mr. AXTELL. Yes.

The COURT. Confine it to that for the present.

Q. Were you in the hospital when he was brought in? A. Yes, sir.

Q. Do you remember who brought him into the hospital? A. As far as I could remember the second mate brought him in that night.

Q. You saw him there, did you, with the second mate? A. Yes, sir.

Q. Describe his condition? A. As far as I could see, blisters on his back, a cut over his head, swelled up over his left eye, if I am not mistaken, and he was coughing up blood.

Q. Was he conscious or unconscious when you first saw him? A. Conscious when I seen him.

The COURT. Do you mean that he was coughing up blood in the presence of the captain?

The WITNESS. The captain was not there.

The COURT. How?

The WITNESS. The captain was not there.

207 Q. The second officer was there, was he? A. He was; yes, sir.

Q. What did the second officer do for him? A. All they give him was a dose of salts and made him comfortable.

Q. Did you ever see the captain in that room with Lustgarten? A. I seen him the next morning.

Q. Tell the jury what took place at that time. A. He told me to go to work, and I was laid up, and I refused to go to work, and they told him to go to work and forced him to go to work.

Q. What did you hear said between the captain and Lustgarten? A. Well, he told him, he says, "The other man ain't able to go to work," he says, "You better turn to," and helped him out the doorway.

Q. He helped him out the doorway? A. Yes, sir.

Q. Did he take hold of him? A. Just took him by the hand and says, "You better turn to."

Q. Did he make any examination of Lustgarten before that, to find out what his condition was? A. Not that I know of.

Q. Did he ask him any questions? A. Well, he asked him what was wrong, asked him if he was hurt. He says he was not hurt at all.

Q. What is that? A. He asked him if he was hurt; he said yes, and the old man, the captain, said he was not hurt at all.

Q. Did he make any examination to find out if he was hurt—any examination? A. Not that I know of.

Q. What was said by the captain and Lustgarten at that time? A. Lustgarten told him he was hurt.

Q. What did Lustgarten say? A. Told him he was dumping the ash can over when the spray came up and hit him.

208 Mr. LANDIS. Your honor, this is not material.

The COURT. Objection overruled. This was in the presence of the captain?

The WITNESS. Yes.

Q. Go right ahead and finish it. A. Well, he told him he was hurt, a spray came over and hit him, and the captain told him—he did not believe it, he says, "You better go to work," he says, "We are too many men short now."

The COURT. Is that all he said to the captain?

The WITNESS. Yes, sir; that he was not able to work.

Q. What did the captain do then? A. Why, helped him out the doorway and told him he better turn to.

Q. How long was the captain in the room? A. I do not think he was in it over five minutes.

Q. Was Lustgarten dressed or not dressed when he came in? A. Sir?

Q. Was Lustgarten dressed or not when the captain came in? A. Well, as far as I know he was laying in bed at the time.

Q. Do you remember whether he had his clothes on or not? A. I could not tell you.

Q. Do you remember whether any clothes were provided for him by the captain? A. No, sir.

Q. You do not recall? A. No, sir.

Mr. AXTELL. That is all.

Mr. LANDIS. No cross-examination.

209 ARTHUR J. HENRIQUES, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. What is your occupation? A. Marine surveyor.

Q. Will you state your experience as a navigator and marine and shipbuilder, and marine surveyor? A. About thirty years' experience at sea in all the grades, and most all classes of ships, to master. For the last four years I have been practicing as a marine surveyor in New York.

Q. Have you been associated with the defendant in this case? A. No, sir.

Q. I say have you been?

Mr. LANDIS. If your honor please, I object.

Q. Employed by the defendant in this case? A. No, sir.

Mr. LANDIS. I object to it as immaterial.

The COURT. He says no.

Q. I do not mean in this case, but I mean have you been employed, in the general employ of the Emergency Fleet Corporation? A. Yes, sir; I have been.

Q. In what capacity? A. Surveyor.

Q. For how long a period? A. About a year.

Q. What are your duties as a marine surveyor? A. To go aboard the ship and survey, make a survey and examine where accidents have happened and damage to the ship itself.

Q. Are you familiar with shipbuilding, designing, and repairing? A. In a way; yes, sir.

210 Q. Are you familiar with the customs and the practices of equipping ships? A. Yes, sir.

Q. For navigation? A. Yes, sir.

Q. Are you familiar with a vessel known as the "Coelleda," Hog Island type? A. Not that particular type. Of that type.

Q. Have you a photographic reproduction of a Hog Island type of vessel of which the "Coelleda" is one, in your pocket? A. Yes, sir.

Q. Is this the picture of the vessel [indicating]? A. That is the picture of that type, published by the Shipping Board.

Q. And these are the plans [indicating to witness]? A. Yes, sir.

Q. Of that ship or that type of ship, of which there were some 40 or 50 built? A. Yes, sir.

Q. Her name appears on this list, does it? A. Yes, sir.

Q. This is published by the Shipping Board or the Fleet Corporation at Washington, as an official document with relation to the sales of such vessels to the public? A. Yes, sir.

Mr. AXTELL. I offer this in evidence to illustrate the ship. Is there any objection?

Mr. LANDIS. Yes; I object to everything but the picture. I do not object to the picture going in.

Mr. AXTELL. I offer the whole thing, which has the plans attached, to show the general structure, design, and measurements.

The COURT. Objection sustained.

Mr. AXTELL. Counsel has no objection to the photograph.

Mr. LANDIS. No; I won't object to that going in.

11 Mr. AXTELL. Then I will ask counsel to produce the original plans of this vessel which we have subpœnaed.

(Mr. Landis hands Mr. Axtell plans.)

(Picture marked "Exhibit No. 10 for Identification.")

Mr. AXTELL. These plans we have here in blue print are the same, are they not, captain, as this smaller and more convenient issue which we have just offered in evidence?

The COURT. What do you intend to prove by this witness?

Mr. AXTELL. I want these plans—well, by the witness I want to prove the custom and the practice of ash chutes, particular on these ships, as part of the regular equipment.

The COURT. Go ahead with that.

Q. Captain, do you know whether there is any general custom or practice of equipping vessel with ash or garbage chutes for use of the galleys? A. Yes, sir.

Q. Is there any such custom or practice? A. Yes, sir.

Q. Please state what the custom is. A. Ships are equipped with the ash chute, usually made of iron, that fits into the rail and extends over the rail for a short distance, at an angle of about 45 degrees, for the purpose of disposing of ashes or garbage, as the case may be.

Q. And when are those chutes used, captain? A. At sea.

Q. Are there any times in the navigation of the vessel when these chutes are not used? A. They are not used in port.

212 Q. Why not? A. Violate the ordinance, dumping garbage or ashes overboard.

Q. In the harbor? A. In the harbors or alongside the dock.

Q. And is that the only time they are not used? A. It is; yes, sir.

The COURT. What do you mean by that, captain? Do you mean to say that in the navigation of the ship you think it would be unseaworthy practice to take them in?

The WITNESS. To take them in at sea?

The COURT. Yes.

The WITNESS. It is not the custom to take them in at sea.

The COURT. I ask you whether you consider it unseaworthy in the navigation of the ship, to take those chutes in at sea, under very heavy conditions of weather?

The WITNESS. They have never been known to be taken in for heavy weather.

The COURT. What is to prevent their being washed away?

The WITNESS. They are secured to the rail of the ship in such a way that they virtually become part of the ship.

The COURT. They stick out beyond the side of the ship, do they not?

The WITNESS. Yes, sir; over the edge of the ship, and to that they customarily have a canvas chute that goes around, so as to carry the garbage and ashes down to the water's edge. It is mostly canvas.

Q. Look at this photograph, Exhibit No. 3, and at Exhibit No. 5. Can you state what those poles are for, and that plate against

213 the rail, on that vessel, the "Coelleda," of which that is a photograph [handing witness]? A. It appears to be a bracket for a chute.

Q. And what kind of a chute? A. Ash or garbage or——

Q. (Interposing.) Looking at Exhibit No. 3, are you familiar with that construction in Hog Island vessels, that little scupper outside of the shall line of the amidship structure of the ship? A. Yes, sir.

Q. Is that a common design to other vessels, or is it peculiar to the Hog Island vessels?

Mr. LANDIS. If your honor please, I object to that on the ground that it is immaterial.

The COURT. I do not see its materiality.

Mr. AXTELL. I am trying to show the necessary in this instance for having the chute at all times erected, if they are going to dump ashes from the after end of the ship's structure. That is my purpose in the question.

The COURT. Read the question.

(The question was read by the stenographer.)

The COURT. Objection sustained.

Q. In your opinion would it be necessary for the safety of the crew in dumping ashes to maintain the ash chute permanently on the side of the vessel at all times while at sea, especially in rough weather? A. Yes, sir.

Q. I am assuming and I am referring in my question to the ship designed as that photograph illustrates this ship was designed. Are you bearing that in mind? A. Yes, sir.

Q. Will you illustrate to the jury, and step down, if the court has no objection, just how the *the* ash chute would come out of the
214 side of the vessel, by the use of those photographs—that is, illustrating with the use of that photograph? A. I can not, because it does not show the side of the vessel longitudinally. It shows it athwartships and I can not sketch on that.

Q. This photograph, Exhibit No. 3, is looking longitudinally. A. This chute is on the rail, like this, and would extend over at an angle of 45 degrees.

Q. And where would it come to? A. [Witness indicates on exhibit.]

Q. You mean it would be attached to the rail back here, would it? A. There is no rail here at all. There is no rail on this picture.

Q. Then take Exhibit No. 5 for illustration. Assuming that that is on the outer edge or shell of the ship—— A. (Interposing.) Then the chute would come right on top of that, come like this, and then extend out over the rail like that, at an angle of 45 degrees.

Q. It goes up, to the rail, so the man could dump the ashes in conveniently from the deck? A. Yes, just about the height of the top of the bucket or a little less.

Q. Are you able from the plans of this ship which you have examined to give the jury an estimate of the number of tons of water in her lazarette hatch, above her fresh-water hatch, when she had six feet of water in her? A. No, sir.

The COURT. Why go into that? I have ruled on it time and again.

Mr. AXTELL. I know your honor sustains the objection. I want an exception. That is all; your witness.

215 Cross-examination by Mr. LANDIS:

Q. These ash chutes are primarily to keep the ship's side clean, rather than as a safety device, are they not? A. They are both.

Q. They are primarily to keep the ship's side clean, are they not? A. Primarily, yes.

Q. As a safety device, they may or may not be under certain circumstances. How high above the deck does this ash chute stand? A. Oh, I would say something under three feet.

Q. It would extend as high as that second rail, would it not? A. About 30 inches, I would think.

Q. Doesn't it extend as high as the second rail? A. The second rail would not be in place at that particular spot. It is a chain rail, so I am informed, in this case.

Q. It is not according to these pictures. Here is plaintiff's Exhibit No. 4, and it is a pipe rail shown there [indicating]. A. That is the same thing, yes. I don't know that there is any rail there at all. That is on the side of the house. That is bolted on the side of the house.

Q. And how far in from the side of the vessel is that ash chute? A. I should say about 12 inches.

Q. How many ships have you sailed on, captain? A. Something like 35.

Q. Are you able to state as a matter of fact that every one of those 35 ships were equipped with ash chutes? A. No, because of the 35 there were many various types, and some of them sailing vessels.

Q. Well, of all the steamships you sailed on. A. I can not say just how many steamships I sailed on.

Q. All the steamships that you sailed on, were they all equipped with ash chutes? A. I do not recall one that was not.

216 The COURT. Do you recall one in which the ash chute was constantly in use under all conditions of weather?

The WITNESS. At sea, yes, sir; and where it was a coal-burning ship there is an additional device of a traveller that ran out from the fire door, overhead, in which they have a wheel and a hook, and put the buckets on that and run it out on the rail and swung the bucket.

Mr. AXTELL. It is a question whether it is better to damage the iron than human beings. I do not see the need of the question.

The COURT. You may not see the need of the question, but I am trying to get at the facts. I think that was entirely uncalled for.

Mr. AXTELL. I am sorry, your honor.

Q. Have you ever known an ash chute to be knocked off in heavy weather, knocked off the side of the vessel? A. I do not recall any such instance as that.

Q. You whould not say there had not been occasions when that had happened? A. No.

Q. It is probable that it has happened, is it not? A. Probable, yes.

Q. And it would be more dangerous if the ash chute was knocked off, and the man were dumping ashes, than if it were not there? A. I could not answer that question.

Q. Then when you answered that it was a safety device, as Mr. Axtell asked you—that is, it was necessary for the safety of the men dumping ashes—you did not know what you were talking about, did you? A. I knew what I was talking about, yes.

Q. Can't you answer my last question? A. That is an hypothetical question.

217 The COURT. That is what you are here for.

Q. So was Mr. Axtell's question. It would be more dan-

gerous to have the ash chute there if it were knocked off, than not to have it there, for the man dumping ashes? A. No, I would not say it would.

Q. If the ash chute was knocked off? A. Yes.

Q. By a heavy sea coming over the vessel?

Mr. AXTELL. I object.

The COURT. Objection overruled.

Q. Do you want the jury to understand that if the ash chute were knocked off that the man dumping ashes into the mouth of that ash chute, a heavy steel affair, would be in a less dangerous position? A. Yes.

The COURT. Will you explain that, Captain?

The WITNESS. Why, if the sea came up and washed that ash chute over, it would probably go over the side, and that bucket is inside the rail.

The COURT. Why do you say probably?

The WITNESS. Because most of the weight of the ash chute is over the rail, over the edge of the rail.

The COURT. I thought you told me a moment ago that the only thing that was over the rail was the cloth that was on the end of it.

The WITNESS. No, sir; this ash chute is built oblong in shape, sets on the rail, and then out from it at any angle of 45 degrees, with the chute over the side.

218 The COURT. Does the chute go through, beyond the side of the ship?

The WITNESS. Yes, sir.

The COURT. I thought you said five minutes ago that it did not; I so understood you.

The WITNESS. Well, perhaps I did not fully——

The COURT. If it does protrude from the side of the ship, how far does it protrude?

The WITNESS. Just a short distance.

The COURT. How many feet?

The WITNESS. 14 inches.

The COURT. And how far does the iron structure protrude inside the rail?

The WITNESS. About 12 inches, I should say.

The COURT. Then I understood right along that protruding device is inside the rail.

The WITNESS. Yes.

The COURT. What happens if he is standing forward of that and a wave hits the part of that structure protruding beyond the side of the ship?

The WITNESS. He is standing forward of it, he would be on the weather side of it in that case, and the wave would strike him first before it struck the ash can.

The COURT. The wave may not come inboard at all. I am talking about a wave that strikes the portion of that structure outboard, and the man is standing forward of the inboard portion. What happens to the man?

The WITNESS. He is struck at the same time, but he is clear of the chute.

The COURT. How is he clear of the chute?

219 The WITNESS. He is standing on the deck and the chute is on the rail, and over the rail.

The COURT. You said it extends 14 inches outside.

The WITNESS. It extends 14 inches outside and 12 inches inside as well.

The COURT. Please explain to me what you mean when you say that that is a safety device?

The WITNESS. Because the man does not have to lift the bucket; he can get the edge of the bucket up against the edge of the chute and dump it in.

The COURT. Then the only safety in it is if he attempts to lift something that is too heavy for him to lift; is that all?

The WITNESS. Yes, sir; he has to lift the bucket up to the rail to get it over without the chute.

Q. Of course, a wave coming over the side of the vessel where he was dumping ashes would hit him, regardless of whether he was dumping ashes into the ash chute or not, would it not? A. Yes, sir.

Q. How many Hog Island ships have you actually seen?

The COURT. I do not think you need pursue that.

Mr. LANDIS. All right.

Redirect examination by Mr. AXTELL:

Q. Is it a fact that the ash chute designed for this vessel, to attach to this steel rail, is of a strong, permanent character, such as

220 described by the witness Tyburski—metal half an inch thick? A. Yes, sir; from the photograph.

Q. And it is likely that such a structure as that would be washed off by the seas that went on that deck?

The COURT. On that deck?

Mr. AXTELL. On the deck where it is attached.

Mr. LANDIS. Your honor, this man is not qualified.

The COURT. It does not cover the point. The seas do not strike on the deck at all. The idea of sticking a structure of that kind out into the ocean—it ought to be explained.

Mr. AXTELL. The pictures explain it, if your honor will let me show you. There are the holes for it right there through that thing, botled on half-inch metal. It extends barely over the edge, and carries it over this scupper. How is the man going to get from that rail to the side? If the permanent part of the ship that belongs there were there, this accident would not have happened. That is perfectly clear to me.

(Witness excused.)

Dr. WILLIAM M. CARHART, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. What is your occupation, Doctor? A. I am a specialist in the eye and ear.

221 Q. Are you a licensed physician and surgeon in this city? A. I am.

Q. How long have you been practicing? A. Since 1891.

Q. Are you connected with any hospitals at the present time? A. I am in charge of one of the clinics of the department of health children's eye service in the Bureau of Child Hygiene. I was twenty years connected with the Manhattan Eye, Ear, and Throat Hospital as assistant attending surgeon, and I am consulting oculist to the Peekskill Hospital up the river.

Q. Have you examined at my request this man Benjamin Lustgarten? A. I have, three times.

Q. When did you first see him? A. On the 10th of this last May.

Q. When did you last see him? A. On the 3rd of this month, June.

Q. You mean you saw him in May, 1926? A. No; May, 1927. I have no record of having seen him in 1926.

Q. Will you describe him, please, at the time when you first examined him. A. I examined his eyes subjectively for vision and objectively for the cause of the loss of sight. He had only perception of light in the right eye, and there was practically no field of vision—what I mean by that is that he merely saw the light but could not place the direction of the light when it was flashed into his eye from the side or from the front. In the left eye he had twenty-two one-hundredths vision, which is about a fifth of vision. He had a great deal of photophobia or drift light because—I found that out by flashing light from the side into the eye, and he evidently was not only pained by it but he shrank from it. Objectively in the right eye there was a brownish discoloration or scar

222 on the white of the eye, about half way from the margin of the cornea to the outer angle of the right eye. Apparently there had been—do you want me to go and say—well, I will go ahead. Apparently there had been an injury there which had destroyed the integrity of the covering of the eye at that spot, and apparently some of the inner coating of the eye had protruded, causing the discoloration. Then looking into the eye with the ophthalmoscope I saw that there was beginning optic atrophy—that is, that the optic disc was paler than it had been. On one edge it was swollen as if he had had an optic neuritis from which he was gradually recovering. All over that eye and over the other eye there were brownish spots of a neuroretinitis over the whole extent of the retina of each eye. There was no change in transparency of the lens in either eye, so I could see clearly the condition of the back part.

The COURT. Will you come to the cause of this?

The WITNESS. Yes; in my estimation——

The COURT. Just a moment. Will you ask the hypothetical question?

Q. Doctor, is this condition permanent or not permanent? A. Absolutely permanent and progressive.

Q. And what degree of blindness do you find that the men is suffering in either eye at the present time? A. He is practically entirely blind in the right eye and will be entirely blind some time in the future in the left eye.

Q. Assuming that this man could see from both eyes well enough to wear glasses and could pass an examination for a able seaman's certificate prior to March 5, 1926, and that on that date, being
223 in good health, having had no serious injury or illness except the fracture of the elbow or some other injury of that character; that on that date he was struck by an ash can, or carried by a sea against the rail and his head was injured and he was knocked unconscious, and he had a bruise on his forehead above the right eye; that his right eye was inflamed, that his face and jaw were swollen, that he was spitting blood; that he was on the ship in the hospital over night and the next day required to go to work; that he worked for a short time and then was relieved from duty and then left on the ship until she arrived at the Azore Islands some seven or eight days later, possibly; that he was taken off the ship and put under the care of a doctor in a hospital, and then brought him home to the United States on another vessel, when he entered the Marine Hospital and stayed for a period of three or four weeks, and has been treated in various hospitals by various doctors since then,—in the condition you found him on the days you have stated, can you state with reasonable certainty whether or not such injury or blow as I have described it might have been or was the competent producing cause of the blindness that you find that he now suffers from? A. It may have been, and was, in my estimation.

Q. Is treatment after such an injury or relief from work of any importance in the matter of treatment? A. None at all.

Q. I mean to say——

Mr. LANDIS. If your honor please, I am going to object to this.

The COURT. Do you object to that last question?

Mr. LANDIS. No.

224 Q. The question I want you to answer is this: Would requiring a man to work after such an accident improve or make worse his condition?

Mr. LANDIS. I object to the question on the ground it has already been answered and in view of the fact that in any event the time that the plaintiff was required to work is not shown.

The COURT. Objection sustained.

Mr. AXTELL. Exception. That is all.

Cross-examination by Mr. LANDIS:

Q. Doctor, why did you say that in your opinion it not only might have been but was the cause of this trouble. You do not know whether this accident happened or not, do you?

The COURT. I shall instruct the jury to disregard this testimony as to the condition of his eye.

Mr. AXTELL. Disregard all the testimony?

The COURT. As to the condition of his eye. You may have an exception.

Mr. AXTELL. I did not get it.

The COURT. As to the condition of his eye, that question will be excluded.

Mr. AXTELL. The condition of his eye now?

The COURT. You may proceed, Mr. Axtell. You may take your exception and proceed, please.

Mr. AXTELL. In justice to my client I can not proceed without understanding your honor's ruling.

The COURT. I say I shall instruct the jury to disregard the testimony of this witness. Now you may proceed. I do not think
225 that any right to recover for that condition has been established. I understand from counsel that no further testimony is to be offered on the question of liability. That is the basis of the statement.

Mr. AXTELL. I see. That is all.

(Witness excused.)

Dr. WILLIAM T. POWER, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. What is your occupation, Doctor? A. Physician.

Q. How long have you been practicing? A. Over 25 years.

Q. Have you specialized in any particular branches? A. I practice general medicine, specializing in diseases of the eye.

Q. Have you had experience with tuberculosis? A. Yes.

Q. And have you made certain X ray examinations and other examinations of the plaintiff Lustgarten, with a view to determining whether or not he was suffering from that disease? A. Yes, I have.

Q. What times have you examined him, and what have you done with a view to ascertaining his condition? A. I examined him first on April 6th, 1926, and again on January 28th, 1927, and again on June 2nd, 1927. I made a general physical examination of his chest—that is, listening with a stethoscope, by percussion and sounding of the chest, observation of his breathing, and I took
226 X rays of his chest; also examined with a fluoroscope, which is another means of X ray examination by vision.

Q. Well, what did you find on the first occasion? A. On the first occasion I found moist rales in the upper parts of both lungs—that is, in the extreme upper part of both and the middle portion of the right lung. I did not at that time find any distinctive evidence of

tuberculosis, but later on January 28th, 1927, I found additional rales spread further over both lungs, and by X ray examination I found—well, not in January. In January, 1927, I found a further—an infiltration in the lungs, which still was not typical of tuberculosis, but on the last examination of June 2nd, 1927, I found a general diffuse infiltration with certain deposits which were tubercular. He had advanced from a pretubercular state to an advanced tuberculosis on June 2nd.

Q. Is he now in a tubercular condition? A. He is.

Q. Assuming that on the 5th of March, 1926, this young man was in good physical condition and had no previous illness or lung trouble or injury to his lungs, was strong and healthy; that on that date in the afternoon about six or seven he was struck by a sea while dumping ashes over the side of the vessel and washed up and knocked down on the rail and crushed between the heavy ash can and the rail, injuring his ribs and his body in the region of the juncture of the ribs and the abdomen; that he had difficulty in breathing afterwards and suffered a great deal of pain in the chest and lungs, and that on the morning following the accident he was required to get up out of his bunk in the hospital on the ship and go to work, by the
227 master of the vessel, without any previous examination being made to find out his condition; that while thus obeying orders and while kneading bread in the galley a quantity of blood came from his mouth which he could not control, and that some time after that he had been given a large dose of Epsom salts with water, with no other treatment excepting rubbing with vaseline or some liniment; that he was taken off the ship some seven or eight days later and carried to a hospital of the United States, where he received hospital treatment; that he continued and was in the condition that you describe when you first saw him, and subsequently at the dates you have mentioned—can you state with reasonable certainty whether or not the act of the master in requiring him to resume his duties in the galley was or might have been a competent producing cause of the aggravation of his condition that is resulting in tuberculosis? A. I can; yes, sir.

Q. Was such act of the master in requiring him to work in your opinion a competent producing cause of the tuberculosis from which he now suffers? A. Yes· requiring him to work in the condition in which he was following the accident.

Q. Is this condition he now is in permanent or not? A. It is permanent.

Mr. AXTELL. That is all.

Cross-examination by Mr. LANDIS:

Q. Doctor, you do not know much about the condition that he was in after the accident, do you? A. Pardon me?

Q. You do not know much about the condition that he was in following the accident, do you? A. I was assuming.

228 Q. Yes; you were making a wild guess. A. No, I was making no wild guess. The question is assuming the facts that the attorney stated, and I am assuming.

Q. What facts did he state except that the man got wet and got hit by this wave and got struck in the chest against the side of the vessel? A. And all the rest of the facts, having a hemorrhage from the lungs.

Q. When was this hemorrhage? A. The following morning, as I understand the question.

Q. It was when he was working; he had not had the hemorrhage before. Do you mean to say that that man's working for two hours was the cause of this tuberculosis? A. I said in the condition in which he was, that it aggravated——

Q. (Interposing.) Answer the question yes or no, Doctor. A. I can not answer the question yes or no.

Q. Are you a specialist in tuberculosis? A. I do not specialize in it; no.

Q. You are a general practitioner and? A. Yes.

Q. And you practice electrotherapeutics more than anything else, do you not? A. No, sir.

Q. Aren't you in the directory as being a practitioner for electrotherapeutics? A. I am in the directory as being a member of the electrotherapeutics——

The COURT. Ask him the questions and let him answer.

Q. Are you a member of any hospital now? A. I have resigned from several of them. Not now.

Q. Do general practitioners pass upon a man's tuberculosis when you have a case come to you? A. I do not. I do at times.

229 Q. It is generally done by your profession, isn't it? A. Well, any physician is competent to pass on tuberculosis. That belongs to general medicine.

Q. Is that why they have specialists in it, because any physician is competent? A. They have them in doubtful cases, and very often for the satisfaction of the family—sharing the responsibility for causing one to disrupt his whole life for such a serious disease.

Q. Your whole diagnosis of tuberculosis in this man's case is due to these râles? A. Râles?

Q. Râles; whatever you call them. Why, no; I testified I examined him with the fluoroscope; I took X-ray pictures of his chest.

Q. What did the X-ray pictures show? A. I testified to that also.

Q. Then testify to it again. A. The first ones did not show tuberculosis and the last ones did.

Q. What do you mean by showing tuberculosis? A. Showing the condition produced by tuberculosis.

Q. What is that condition? A. Infiltration.

Q. What does infiltration mean? A. Why, an inflammation begins from the tubercle bacillus.

Q. Is there anything else that causes that?

The COURT. Have you motions in this case?

Mr. LANDIS. Yes, I believe so.

The COURT. I will excuse the jury until two o'clock. Is this your last witness?

Mr. AXTELL. Yes, sir.

(At this point the point the jury was excused until two o'clock p. m.)

The COURT. I think the case is complete except for the cross-examination of this witness. If there is no objection of counsel I will hear the motions at this time.

230 Mr. LANDIS. If your honor please, I move to dismiss the complaint in both causes of action, as against both defendants, on the ground that the plaintiff has not made out a cause of action, has not made out a case, inasmuch as he has failed to connect any injury which the plaintiff sustained at that time with any fault on the part of the ship. That is particularly with regard to the first cause of action. With regard to the second cause of action, that on the plaintiff's own admission he was not made to work after the captain realized how ill he was; that he was given the best of medical attention, according to his own statement, and was put off the ship at Punta del Garda to enter the hospital.

The COURT. There was one witness testified this morning that he had hemorrhages before the captain came to his room.

Mr. LANDIS. He testified he did not.

Mr. AXTELL. He said he had blood in his mouth. That his teeth were broken. I did not bring that out.

The COURT. He said he was spitting and vomiting blood, but the captain came there and ordered him to work.

Mr. LANDIS. That same witness admitted he did not know whether he had done that in the captain's presence or not.

The COURT. No; he said he had done it in the other officer's presence.

Mr. LANDIS. No; I do not think he said that.

The COURT. I asked him myself. I asked him if this happened when the captain was there. He said, no; he was not there, the

231 other officer was—Mr. Abbott—that he was spitting blood.

Mr. LANDIS. What happened was as soon as Mr. Abbott found this man was at work, he took this man up on the bridge, and then the captain let him off work and marked him "off" officially.

The COURT. You have a statement from the doctor that this tuberculosis was produced by this accident. I think that is a question of fact.

Mr. LANDIS. How about my first motions? May I renew them?

Mr. AXTELL. Of course, the plaintiff admits, as your honor very quickly saw, that he was blamed here partly, because after he got the order to dump the ashes and after he told the cook to help him, he went and filled this bucket fuller of ashes than it was before, which shows that it was at least partly his fault. I say this equipment, which is a part of the equipment of every vessel and belonged to

every ship just the same as her booms, is essential to her cargo but is just as essential to the crew, and belongs in place when the vessel is at sea, just the same as her lifeboats do. That is the evidence in the case, and that is true. I do not want your honor to feel there is any doubt about that. That is so on every ship. They take them down in harbors because if they are left there the crew regard that as sort of permission.

(A discussion ensued not reported.)

The COURT. I think that it was a mere convenience and not a safety device. What other ground is there?

232 Mr. AXTELL. The ordering by his chief officer to do that work at that time when the seas were rolling as badly as they were. The boy protested—it is true, midly, but that does not make any difference.

(A further discussion ensued not reported.)

The COURT. I will dismiss the first cause of action.

Mr. AXTELL. Exception.

Mr. LANDIS. If your honor pleases, may I renew my motion on the second cause of action, on the ground that there is no proof in this case that the captain had any reason to believe that man was in a serious condition when he suggested that he go to work; and the captain only when he had reason or sufficent reason to know the man was actually ill and suffering excused him. As soon as the captain had an opportunity to find out from the man in charge of that duty aboard that vessel how this man was, he relieved him from duty. He did ask him questions, and Lustgarten's own testimony and the testimony of this witness who was in the same room was that nothing much was said except, "I am sick." The captain had a malingering crew, and it was natural.

The COURT. There is testimony that the other officer came to him when he found him at work and said, "You ought not to be at work," and took him up to the bridge and told him, the captain.

Mr. LANDIS. Yes; but the captain did not know anything about it.

(A discussion ensued not reported.)

233 Mr. LANDIS. There is no evidence that shows any officer had any knowledge of this accident.

The COURT. Whatever that may be, there is very convincing evidence that it happened. As soon as he found this man hurt, he, being a man who had examined him or talked to him, said, "Here, young chap, you should not be at work, you are too sick," and immediately took him to the bridge and told the captain he should not be at work.

Mr. LANDIS. We have got to put on to meet this particular second cause of action about fifteen witnesses. May I move to strike out that part of the second cause of action which alleges medical treatment was refused?

The COURT. The pleading will stand. Whether it is within the four corners of it I do not know.

Mr. AXTELL. I would like to reopen to ask the plaintiff a few questions. I will ask your honor to let me just prove—or perhaps we could agree that fifteen or twenty dollars a week would be a reasonable sum for maintenance and cure during the period of his disability.

(Recess until 2:15 o'clock p. m.)

AFTERNOON SESSION

234 Dr. WILLIAM T. POWER resumed the stand.

Cross-examination by Mr. LANDIS:

Q. Dr. Power, tuberculosis is a bacteria disease, is it not—a germ disease? A. Yes, a germ disease.

Q. Is it contagious? A. Yes.

Q. Are we all carrying germs, tubercular germs? A. That is the opinion, that germs are present in all persons.

Q. Now, will you explain to the jury how an accident can cause tuberculosis in a germ disease? A. Well, as you just said, the germs are present in the mouths and the respiratory passages, the breathing passages of all individuals, but we have a certain resistance to disease. Anything that lowers our resistance or breaks down the general strength and health, is apt—is capable of giving these germs a chance to multiply and overwhelm the individual with the disease.

Q. Do you know the nature of the work plaintiff was doing for the few hours he was working? A. No, I do not.

Q. Doesn't a great deal depend on the nature of the work he was doing, whether or not the work might cause him to have tuberculosis? A. Why, in view of the condition he was in, he should have been in bed. Anything he might have been doing was not beneficial for him.

Q. You have not answered the question. The question is, doesn't a great deal depend upon the nature of the work he was doing, whether or not the work might cause him to have tuberculosis? A. Of course you mean at this particular time, after the accident. Well, I said he should have been in bed. He was not fit to do any work, and the harder the work the more liable it would be to cause damage.

235 Q. The mere fact that he was not in bed is the cause you believe of his having tuberculosis? A. Well, I could not quite put it like that. The mere fact that he was not in bed—but he was in such condition that for his best——

Q. (Interrupting.) That does not answer the question, Doctor. Your answer is no to my question? A. The question is too narrow.

Q. Your answer is no to my question? A. I don't like to say no to the question, but I would have to explain if I answer it at all.

Q. Unfortunately I have the right to confine you to yes or not. Your answer is no? A. What is the question?

Q. The question is, the mere fact that he was not in bed is the cause you believe of his having tuberculosis? A. I don't think that could be fairly answered by yes or no.

Q. Well, then, you refuse to answer? A. Yes, I can not answer that.

Q. Suppose that this witness were up and about that vessel for a period of four or five days on his own accord, at his own desire, that would have contributed to his having tuberculosis? A. Yes.

Q. If he were doing very light work in the galley, the chances are so remote that that could have caused tuberculosis that they are negligible, aren't they? A. I know, in addition to the fact he was up and about, any added exertion would be that much more exposure and weakening.

Q. You have answered my question; that of itself, and not in connection with anything else? A. Light work in the galley itself would not cause tuberculosis: no.

Q. The fact that this accident had occurred and he was
236 doing light work in the galley, would that be the cause of tuberculosis, the light work in the galley, from the accident? A. At one time you put that to contribute to the development of tuberculosis and at another time the cause.

Q. I am asking the question. A. I would not say it would be the cause, but it would contribute. Just a little light work is not a recognized cause of tuberculosis. I don't want to be on record as saying anything like that.

Q. Then you withdraw your statement made on direct examination that his working for two hours in the galley was responsible, in part responsible, for the fact that he has tuberculosis? A. No; I will not withdraw that.

Q. You admit that the fact that he was doing light work, the work in the galley, without your knowing what sort of work he was doing, was not the cause of tuberculosis? A. In a well man, that alone would not be the cause of tuberculosis. But considering this man's condition, it brought on tuberculosis.

Q. Regardless of what work he was doing? A. Yes; the mere fact of his being up and about was against his best interest.

Q. Did you personally take these X rays? A. I did, yes.

Q. On what date? A. These two, Nos. 2438 and 2439, were taken on June 3. I took them.

Q. And did you take these? A. Yes.

Mr. LANDIS. I ask that these be marked in evidence.

(Marked "Defendant's Exhibits B and C.)

The WITNESS. Nos. 2051 and 2052 were taken on April 6, 1926.

Mr. AXTELL. I offer them in evidence.

Mr. LANDIS. I will offer them.

237 (Marked "Defendant's Exhibits D and E.")

Mr. LANDIS. May I proceed?

The COURT. Yes.

Q. Doctor, do these X rays there taken in April, 1926, indicate that the plaintiff had tuberculosis? A. No; they do not.

Q. They do not? A. No.

Q. And you dare say that this plaintiff has tuberculosis today, a year and four months after this accident, without knowing what may have intervened in his life in between—that the cause of his tuberculosis today is that accident. A. I made that statement in answer to a hypothetical question which assumed that nothing else had developed since, or rather that it was a competent producing cause, that is the wording of the question.

Q. It might not have caused it? You admit that? It might have happened otherwise? A. A man might have such an accident and not have tuberculosis; yes.

Q. The tuberculosis that he has at the present time might not have resulted from that accident, is that true. A. As I examined him one month after the accident, and found a condition I then reported to be suspicious, and advised an examination of the sputum, and on further investigation I considered it a pretubercular condition, and subsequent examinations have borne that out.

Q. You have not answered my question? A. What is the question?

Q. The question is, the tuberculosis that he has at the present time might not have resulted from that accident, is that true? A. Why, it is true; yes.

Q. You don't know why he has tuberculosis today, do you?
238 A. Except that I am of the opinion that the sequence of events gives this diagnosis.

Q. Yes; but you don't know what has happened in between or anything else, do you? A. I have not been with him all the time; no.

Q. So you don't really know what caused this alleged tubercular condition of the plaintiff? A. Well——

Q. (Interrupting.) Answer that by yes or no, Doctor. Do you know or don't you? A. Your questions calling for yes or no are not fair.

Q. I cannot help it. A. You cannot ask medical questions that way. They must be explained.

Q. The question is, so you don't really know what caused this alleged tubercular condition of the plaintiff? A. I feel I know, having examined him at three different times, once a month after the accident.

Q. But you don't; do you? You don't? A. I know as well as I would in any private patient I examine.

Q. Then you want to go on this record that you do know, and you are definitely certain that this alleged accident, even though it may never have occurred so far as you know, was the cause of this tubercular condition, so-called tubercular condition of the plaintiff? A. I am assuming it did.

Q. You don't know whether it did or not? A. All of my testimony is based on that assumption. Of course, I did not see the accident.

Q. And you don't know what caused this tubercular condition or alleged tubercular condition, do you? A. I testified in my opinion the result of the accident.

Q. You say you don't know? A. Why should I say so?

239 Q. You do not actually know what caused this? A. Of course anybody may develop tuberculosis, but we are speaking of one specific case, and I know considerably about the man; I have examined him three times, and I know what happened.

Q. You did not see what happened to him, did you? A. No; but my whole testimony is based on the assumption it did happen.

Q. I am asking you a different question than the hypothetical question asked you by Mr. Axtell. Answer my question. You don't know what caused this tubercular condition? A. Well, of course, tubercular infection, of course, causes tuberculosis.

Q. And you don't know what caused that tubercular infection, do you? A. The breaking down of his resistance to the infection of those germs.

Q. And you don't know what broke them down? A. I know one sufficient cause, and that is the injury.

Q. You don't know that he had any injury? A. I heard him testify to it. He was under oath.

Q. That does not mean that he had one. That is in dispute here.

The Court. I shall instruct the jury that the testimony is as far as the accident is concerned is based upon the facts testified to and assumed in the questions put to the witness. If those facts fall his testimony falls. He said he didn't know what happened on the ship. He is assuming that from the questions put to him.

Q. How many times have you appeared in court the last month? A. The last month?

Q. For various plaintiffs? A. If I remember rightly, I think this is the only time this month.

240 Q. How many times the month before, in May? A. I can only guess, I am not sure. I was employed may be once or twice; I am not sure. I say that in May. I have no records with me.

Q. Doctor, would you say that I am misstating the fact if I said you appeared in court against me once in May; A. No; I don't know exactly; I may have been in court two or three times.

Q. You appear for the plaintiffs in court frequently in all manner of cases and all manner of diseases? A. Yes.

Q. How many times have you appeared for Mr. Axtell since January, roughly? A. I don't know, I think around—a number of times.

Q. Oh, make an approximation? A. That will be difficult.

Q. One hundred times? A. Oh, no; far less.

Q. Twenty times? A. Well, this is June—possibly.

Q. You appeared about twenty times for Mr. Axtell? A. I can not tell for sure.

Q. Have any of those been tuberculosis cases? A. Well, that I am not sure of. I would be entirely willing to tell you, but I don't recall.

Q. And you are willing to let your testimony stand, that this tubercular condition is due to the fact that this man was made to work after the accident; is that true? A. Yes.

Q. Do you know Doctor Thoburn? A. No; I do not.

Q. I hand you this Exhibit B and also Exhibit C, and ask you when those X rays were taken? A. June 3, 1927.

Q. And what is the condition shown on those X rays that leads you to believe this plaintiff has tuberculosis? A. Diffused infiltration of the lungs.

Mr. AXTELL. May I suggest the witness be permitted to use this light?

241 The COURT. If he wishes.

The WITNESS. A calcified tubercular lobe in one lung.

Q. And what does that mean in more plain words? A. It has become hardened into calcium salt.

Q. Any callus? A. No callus.

Q. Is that caused by anything besides the tuberculosis? A. No.

Q. Only by tuberculosis? A. Yes.

Q. Is that a sure sign of tuberculosis? A. Yes.

Q. Which lung is that? A. In the right lung. There is one here, that white spot; there is a second one there, this spot [indicating].

Q. Isn't that caused by something else? A. No, that is a tubercular condition. That is typical of a calcified lung.

Q. And that is what you base your diagnosis on? A. The infiltration.

Q. Did you ever find any bacteria in this man's sputum? A. No. I made—I only examined one of his sputa.

Mr. LANDIS. That is all.

Mr. AXTELL. Is there any other picture——

The WITNESS. That same spot is there.

By Mr. LANDIS:

Q. Is this the same, taken at the same time? A. The same day; yes.

Mr. AXTELL. How about the other X ray taken at an earlier date?

The WITNESS. No; they don't show evidence of tuberculosis.

242 Mr. LANDIS. Show the other one to the doctor, will you?

Q. Is this the same white spot there? A. That is on the rib, that is the union of the bony part of the rib with the backbone.

Q. This one little white spot there? A. No, that [indicating].

Q. Is this the backbone, Doctor? A. This is the sternum; this bone overlays his backbone.

Q. This is the front view? A. Yes.

Q. This is the front view, is it not? A. Yes.

Q. And then this is viewing the back part of the rib from the front, is it not? A. Yes.

Q. And that spot is some distance away from the backbone, is it not? A. I will have to take that back. These are the ribs at the back.

Q. Then this is the front rib? A. Yes.

Q. And that then is not connected to the backbones? A. No.

Q. That particular white spot? A. No.

Q. What is that? A. It is a part of the cartilaginous connection of the rib with the breastbone.

Q. As a matter of fact, isn't that what this white spot is, too? A. No; it is not.

Q. The white spot that you referred to before? A. No.

Mr. AXTELL. Indicating what? What do you mean? Referring to Exhibit A?

Q. Referring to white spot in Exhibit B that has been marked before? A. No; that is between the ribs.

Q. Is this a front or back view? A. It is a front view.

243 Q. And then that is a different view than Exhibit E, which we were looking at a minute ago? A. Yes.

Q. Then put Exhibit C before the light, Doctor, and let me see the spot. A. The spot is between the ribs, not on the ribs.

Q. And you base your whole diagnosis upon that one spot shown in that X ray? A. Further infiltration throughout the lung, as shown by this marking, out here.

Q. Couldn't that be done—couldn't that be caused by some disease? A. Not that kind of a marking.

Q. Couldn't that be caused for instance by bronchitis? A. No.

Mr. LANDIS. That is all.

Redirect examination by Mr. AXTELL:

Q. In making your diagnosis, did you use a stethoscope? A. Yes.

Q. And in taking your X ray? A. I made a general physical examination.

Q. And a fluoroscope? A. I made a general physical examination.

Q. Explain a fluoroscope, and what you can do with it. A. A fluoroscope is an instrument by which we can see into the body by means of an X ray behind the patient, which brings out a vision through the body.

Q. You can see the depth as well as directly through? A. Yes.

Q. And if there is any calcareous condition, or whatever kind of matter you described, in the internal part of the lung, through the fluoroscope you could see its relative position from the front to the back of the patient? A. Fairly well with a fluoroscope.

244 Q. You can as to fractures, is that true? A. Yes.

Q. So if a bone is fractured, whether overlapping or not? A. Because you can get different views.

Q. That is the purpose and object of using a fluroscope? A. Yes; to aid.

Q. What other observation did you make of the condition with the X ray and fluoroscope diagnosis that led you to the conclusion the man now has tuberculosis? A. The râlies in his chest.

Q. What are they? A. Those are abnormal sounds in breathing that we hear with a stethoscope.

Q. That is, you have a patient breathe and have a stethoscope on his chest and listen at different points and get the sound? A. Yes; there are normal and abnormal sounds known as râles.

Q. You speak of râles at the time you made your first examination? A. Yes.

Q. You diagnosed it then as what? A. As suspicious or incipient tuberculosis.

Q. And on your next examination did you test for râles? A. Yes.

Q. What did you find, Doctor? A. More extensive, or at least over a more extensive area.

Q. And then on your third examination? A. Still more extensive.

Q. Do you say or not this condition is permanent? A. Permanent.

Q. How long will he live? A. I could not say that. Under very favorable conditions he may live a long time, and it might be arrested; it may be stopped where it is and not progress further for a long time under favorable conditions.

Q. Change of climate? A. Probably under favorable treatment.

245 Q. Could you say for sure it could be arrested or cured? A. No.

Q. Could you say he could live ten or twenty or thirty years? A. I could not say.

Q. Is he fit for physical work, physical exertion? Is he fit to be a clerk in a store or bookkeeper or anything of that sort? A. I do not think he should do any indoor work.

Q. Is he strong enough to do any outdoor work? A. The lightest kind of work he might do at present.

Q. A watchman, where he did not have to move around? A. I suppose he could do that.

Q. It would depend on the place where he was to do it? A. Yes; it would.

Recross-examination by Mr. LANDIS:

Q. Doctor, this calcified area you remarked in Exhibit C, that might have been caused by something prior to the accident, might it not? A. It might; yes.

Q. Then why do you make your diagnosis at this time that this is tuberculosis when it might have been something that occurred before? A. Because it is tubercular and it is consistent with the rest of the appearance and the history and physical examination of the patient. That is only a part of the diagnosis.

Q. Something other than tuberculosis might have caused that? A. No.

Q. Only tuberculosis could have caused that calcified area? A. That is all.

The COURT. Doctor, that condition that you have described of calcification is a condition which is entirely not due to the accident?

The WITNESS. That area is; yes.

246 Q. Did you make the patient cough when you listened to these rales? A. I did.

Q. Did you listen before or after the cough? A. Both; I examined him without coughing, and then examined him just a little following.

Q. What did you find? A. I found these so-called crepitant and subcrepitant rales, and following the cough they were inclined to be moist.

Q. It really sounds something like a muscular movement, doesn't it? A. No; not to a practiced ear they don't.

Q. Have you a practiced ear? A. Yes; twenty-five years practice.

Q. Have you a practiced ear in the case of tuberculosis? A. Yes, from the beginning of medicine.

Q. How many cases of tuberculosis have you had in the last year? A. In the last year?

Q. Yes. A. Why, I have had fifteen or twenty cases.

Q. Do you handle them yourself without sending them to a specialist? A. I find it more convenient to have a specialist aid me in placing them in an institution, so I consult with specialists for that reason.

Q. You send most of them to a specialist, is that it? You can answer that by yes or no, for goodness sake. A. I will answer that. I have had consultations with specialists, and as I told you. consultants or specialists seldom make a diagnosis; they aid.

Q. Did you have any specialist in on Mr. Lustgarten? A. No.

Q. You did not go to that trouble in his case? A. It was not necessary. I was not his private physician, to admit or put him in an institution or anything of that sort.

247 Mr. LANDIS. That is all.

Mr. AXTELL. If your honor please, I want to call—unless you will stipulate—will you stipulate that twenty dollars a week would be a fair and reasonable expenditure?

Mr. LANDIS. No.

Mr. AXTELL. Then I will put a witness on as to the question of maintenance or expenditure by the plaintiff. I want to put the plaintiff on.

BENJAMIN LUSTGARTEN, recalled on behalf of the plaintiff, having been previously sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. Now, have you maintained yourself or through the aid of your relatives or credit with them been maintained with the exception—ever since this accident, with the exception of the period you were in the marine hospital of some three weeks? A. Yes, sir.

Q. Have you done any work? A. No.

Q. Have you earned any money at all? A. No money at all.

Q. Do you remember when you got back?

Mr. AXTELL. It is conceded that the plaintiff left the marine hospital at Staten Island April 30th, 1926.

Q. Except for that day or two in Kings County Hospital, you have lived where? A. My sister's house, for seven months, and my cousin's house for seven months.

248 Q. And you owe them for the board and lodging? A. My board and lodging and medical attention.

Q. Have you had any expenditures for doctor's bills? A. Yes, sir.

Q. How much have you expended?

Mr. LANDIS. If your honor please, I am going to object to all of this.

Mr. AXTELL. Will you take, your honor, the bill of particulars?

Mr. LANDIS. I object to this as immaterial, on the ground that this plaintiff when he entered the marine hospital had the opportunity to get cured; and if he did not do it, and he was discharged as cured, we are not responsible for his maintenance.

Mr. AXTELL. He was discharged from the marine hospital.

Mr. LANDIS. He could have gone back.

The COURT. Do you contend he has to be supported by the defendant?

Mr. AXTELL. For a reasonable period, until he is cured.

The COURT. He was discharged cured by the hospital.

Mr. AXTELL. I don't know what they really said about it.

Mr. LANDIS. They diagnosed the case.

Q. Did you leave the hospital of your own accord? A. No there was a man on the ship that died and he was very sick.

Mr. LANDIS. I move to strike this out as not material.

The WITNESS. He asked me——

The COURT (interposing). The answer is no. Next question.

249 Q. You did not leave the hospital of your own account? A. No.

Q. You were discharged although you were willing to stay there? A. Yes.

Q. And wanted to stay there, is that right? A. Yes.

The COURT. He was discharged by the hospital.

Mr. AXTELL. Yes; he was put out of the marine hospital.

The COURT. Do you contend that they did wrong?

Mr. AXTELL. Absolutely.

The COURT. Where is the evidence?

Mr. AXTELL. The evidence is he is tubercular and he was then.

Mr. LANDIS. Your own doctor has testified that he was not.

Q. How much did you spend for doctor bills?

The COURT. Where?

Q. After leaving the hospital? A. $150.

Mr. LANDIS. I object to this, too, on the ground it is immaterial, because the man received treatment; he could have received treatment from the marine hospital if he desired it, and he was discharged from the marine hospital, and he did not have tuberculosis at that time.

The COURT. Objection sustained.

Mr. AXTELL. Exception.

Q. Were you discharged as cured from the marine hospital?
250 A. I was discharged; that is all I know, I was given a plain piece of paper as a discharge.

Q. Did they ever offer to bring you back there and put you in there?

Mr. LANDIS. I object to that question.

Mr. AXTELL. Then your honor rules that out?

Mr. LANDIS. I object to that statement.

Mr. AXTELL. That will be proved, too, if necessary.

The COURT. Whether it can be proved or not, you have no right to state it, and you know it. The jury will disregard it.

Mr. AXTELL. I think in view of all that has been said on the subject, we ought to know why he was discharged from the hospital, and the circumstances. If your honor would look at this record, perhaps you would see it.

The COURT. I am not looking at anything, I only consider the evidence. You can prove your case in any way you see fit.

Q. Did you spend any money for drugs? A. Yes.

Mr. LANDIS. When?

The COURT. He may state.

Q. Did you spend any? A. I did.

Q. When? A. Last summer, all summer.

Mr. LANDIS. If your honor please, I move that the answer be stricken out as immaterial.

The COURT. He can not give it that way.

251 Q. When was it?

The COURT. He said last summer.

The WITNESS. Last summer.

Q. How long after leaving the hospital? A. About three weeks.

Q. After you left the hospital, where did you go? A. I went to live with my sister.

Q. In Philadelphia? A. Yes.

Q. Were you under the care of a doctor there? A. Yes.

Q. And what was his name? A. Dr. Rubin.

Q. What did he treat you for? A. General run-down health.

Mr. LANDIS. I object to that. This man does not know what the doctor treated him for.

Mr. AXTELL. I will withdraw that.

Q. What did the doctor do for you? A. He was taking care of my eyes, and having me go into the eye hospital, and give me a prescription for medicine.

Q. Were you doing any work at that time? A. No, sir.

Q. Just living at home with your sister? A. Yes.

Q. What is her name and address? A. Her name is Mrs. Carrie Singel, 202 Snyder Avenue, Philadelphia.

Q. Did this doctor charge you for services? A. He charged me; he sent me a bill; I could not pay for it.

Mr. LANDIS. If your honor please, I object to this.

252 The COURT. You take the answer, and if you do not like it you object to it.

Q. What was the amount of the bill?

Mr. LANDIS. I object to this.

The COURT. Objection sustained.

Q. How much do you owe your sister for board and lodging?

Mr. LANDIS. I object to that.

The COURT. Objection sustained.

Q. Did you make any agreement to pay her any certain amount for board and lodging?

Mr. LANDIS. I object to that.

The COURT. Objection sustained to all such questions.

Mr. AXTELL. Exception.

Q. What was the cost of your maintenance while you were sick and disabled after leaving the Marine Hospital?

Mr. LANDIS. I object to that.

Q. For the next seven months thereafter?

Mr. LANDIS. I object to the question.

The COURT. Objection sustained as to form.

Q. Did you spend any money for maintenance and cure or for board and lodging?

Mr. LANDIS. I object.

The COURT. When?

253 Q. After leaving the hospital?

The COURT. Objection sustained.

Q. Or within a period of seven months after leaving the hospital, did you make any such expenditure?

Mr. LANDIS. I object, if your honor please.

The COURT. Objection sustained.

Mr. AXTELL. Exception.

Q. Have you paid or contracted to pay your cousin in Brooklyn any sum for maintenance or cure or for your board and lodging or the cost thereof during the past seven months?

Mr. LANDIS. I object, if your honor please.

The COURT. Objection sustained as to form.

Mr. AXTELL. I direct your honor's attention to the last two or three lines of paragraph 10 of the complaint, in which we make specific claim for this disbursement.

The COURT. For what?

Mr. AXTELL. For maintenance and cure. It is in his bill of particulars, too.

The COURT. All right. Next question. I think I will allow him to answer.

Mr. AXTELL. There is a decision in the District Court of California, holding that his relatives can come in and sue for his maintenance and cure, that is for board and lodging and doctor, and recover from the ship's owner.

254 The COURT. You can ask him the question. Most of these objections are sustained as to form. You know how to put the questions.

Mr. AXTELL. Apparently I do not.

The COURT. It is about time you did.

Q. Have you expended any money yourself for board and lodging while you have been disabled and sick after leaving the hospital April 30th, 1926, to the present time?

Mr. LANDIS. I object to that on the ground it is leading.

The COURT. I will allow it. Objection overruled.

Mr. LANDIS. Exception.

A. I have.

Q. How much? A. The money that my father left over when he died.

The COURT. The question is, how much money have you spent for your board and lodging since you left the hospital? That is, that you spent out of your own pocket?

The WITNESS. About $300.

Q. Is that all you had? A. That is all.

Q. Has your sister or your cousin made other expenditures for the board and lodging or doctor's care since then on your behalf until now?

Mr. LANDIS. I object to that, if your honor please, as purely immaterial. This man has no right to recover any expenditures that his sister made.

The COURT. Objection sustained.

255 Q. Have you agreed to pay or reimburse your sister or your cousin for the disbursements they have made for maintenance and cure or board and lodging for your account?

Mr. LANDIS. I object to that.

The COURT. Objection sustained as to form.

Mr. AXTELL. I except. That is all.

The COURT. Why don't you ask him if anything was said about it, if you are really serious.

Mr. AXTELL. I do not understand your honor's ruling.

The COURT. Don't you understand that you can not ask a witness if he agreed, because it is a conclusion?

Mr. AXTELL. I have no more interest in the subject. I leave it to your honor to bring out any additional thing you want in the interest of justice.

The COURT. I can not try your case for you. It is not my place to bring out anything, if counsel is not competent.

Mr. AXTELL. I respectfully except to the suggestion of incompetency. That is all.

Cross-examination by Mr. LANDIS:

Q. Mr. Lustgarten, the $300 that you claim you paid out, to whom did you pay it? A. To my sisters and the doctors.

Q. How much did you pay to your sister? A. About $240.

Q. $240 to your sister? A. Yes.

Q. And on what did did you pay that? A. The court allowed me——

256 Q. (Interrupting.) Answer the question. A. At different times.

Q. When did you first pay her part of the $240; on what date? A. I don't know the date.

Q. Prior to March, 1926? A. I don't know the date.

Q. Was it prior to March, 1926? A. I don't remember the date at all.

The COURT. He has answered twice he don't know whether it was before or after.

Q. You don't know when you gave your sister $240? A. Last summer.

Q. How do you happen to say you don't know whether it was prior to March, 1926, then? A. I don't know the exact date at all. It was either in the middle of the summer or in the summer.

Q. Was this part of your father's estate? A. Yes.

Q. What is your guardian? A. Mr. Joseph Crowley.

Q. Where does he live? A. 1609 Snyder Avenue, Philadelphia.

Q. Is he any relative of yours? A. An uncle.

Q. Did he give you any money? A. He sent me to Mr. O'Brien.

Q. Who is Mr. O'Brien? A. He made a petition to the court, allowing me $10 a week until my funds were gone.

Q. When was this petition made? A. Last summer.

Q. When did you finally finish getting the funds? A. About sometime late in the summer or early in the winter.

Q. Beginning this summer? A. No; last summer.

Q. Beginning last summer? A. Yes.

257 Q. It only lasted a couple of weeks then? A. Yes; about four months.

Q. Four or five months? A. Yes.

Q. What was the total sum you received? A. I don't know. It came in four checks.

Q. Then you don't know how much you paid anybody, do you? A. I paid the entire sum that I drew from my father's estate to my sister.

Q. You paid the entire sum which was $240. A. Whatever it was, either more or less. I got it in three checks, $80, $80, $75, I don't remember; $65 or $75, I don't remember which.

Q. $65, $75, and $80? A. $80—two $80's.

Q. Is that the way they paid you $10 a week, by three checks? A. Yes.

Q. Didn't you travel during this period at all? Didn't you take trips to Philadelphia and back to New York and over to Atlantic City? A. I went to Atlantic City and lived in a friend's house in the summer time.

Q. Didn't you spend any of that money in Atlantic City? A. No.

Q. Where did you get your money to go down there? A. My sister gave it to me.

Q. Was that after you paid her this money? A. No; before she got anything at all.

Q. And then this money you were paying her was in repayment of that loan you received to go down to Atlantic City? A. This was for board and lodging for the time I stayed there.

Mr. LANDIS. That is all.

Mr. AXTELL. That is all.

(Witness excused.)

258 MARTIN WEISS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. AXTELL:

Q. What is your occupation, Mr. Weiss? A. Manager of store.

Q. Do you live in Brooklyn? A. Yes.

Q. Are you married? A. Yes.

Q. Is this boy related to you? A. A cousin.

Q. Has he been living with you for some time past? A. He has been living with me since the middle of December, 1926.

Q. Have you paid for his meals and room?

Mr. LANDIS. If your honor please, I object to that.

The COURT. It will be received subject to a motion to strike it out.

Q. What was the reasonable value of his board and lodging and whatever he has had in the way of home comforts at your house during that period?

Mr. LANDIS. I am going to object to this question on the ground it is immaterial, because this maintenance and cure obligation I believe ceased when the plaintiff left the marine hospital at Staten Island, and he is not entitled to maintenance and cure after that time, and if my contention is correct this evidence is improper.

The COURT. How long do you say he is entitled to it?

Mr. AXTELL. Judge Storey, the former Chief Justice of the Supreme Court of the United States, and also Judge Hough, of this Circuit Court of Appeals, held that it extended for a reason-
259 able period. The law was formerly, as held in the "Osceola" case, that it extended to the end of the voyage. But it has been construed since then as extending beyond the period of the voyage.

The COURT. It does not necessarily contemplate damages for the rest of his life.

Mr. AXTELL. No. On the question of maintenance and cure, the Admiralty courts have been liberal in this State for years. Suppose the hospital is mistaken in its diagnosis of his condition.

The COURT. The ship is not obligated to cure.

Mr. AXTELL. It was obligated to take care of him.

The COURT. It is obligated to take care of him. Really, the basis of it is, that nobody is at fault, nobody is to blame. He is a member of the ship's company. He gets sick, and is a sick man, and is entitled to to be taken care of until he is brought home, and when he is landed in his home port if he needs medical attention the ship must see that he is put in a hospital. When he is put in a hospital

and taken care of, and his condition is no fault of the ship, certainly you can not expect anything further.

Mr. AXTELL. Your honor has a misapprehension of the situation. In the beginning there was no application for indemnity at all.

The COURT. That is another question.

Mr. AXTELL. Let us get this record straight.

The COURT. Where is this in your bill of particulars, about doctor's bills and expense for board and lodging.

260 Mr. AXTELL. In the supplemental bill, for board and lodging. I should think you could admit it and cover it in your charge as a matter of fact, and it would answer the same purpose.

The COURT. You may prove these damages under the second cause of action as part of the loss and expense of obligation incurred, if it is specialized in the bill of particulars and if the expenditure was one which the plaintiff contracted to pay.

Q. What was the just and reasonable value of what you furnished him in the way of food and lodging while he was with you? A. You mean the total expenditure I have had?

Q. Yes. A. A period of about 25 weeks at about $20 a week; sometimes it ran over it, and some weeks a little under it.

Q. How much a week? A. I would state it at $20 a week.

Q. How many weeks? A. 25 weeks.

Q. About $500. A. Yes.

Q. Has he made arrangements to pay that back?

Mr. LANDIS. I object to that.

The COURT. He may state what was said between the parties.

The WITNESS. When he came to me, he remarked his sister can not afford to support him, and he begged me to take him in. He said no matter what happens he would promise to pay me, not matter whether he got it in the case or after the case, no matter what happened, he said he would do his utmost to repay me.

The COURT. Did you agree on an amount?

261 The WITNESS. No; it was not agreed on in amount, because I didn't know how long he would have to stay with me. As a matter of fact, at the time when he came to me, the doctor told me that he would not live long.

Mr. AXTELL. That is all.

Cross-examination by Mr. LANDIS:

Q. What is your address? A. 19 Throop Avenue.

Q. Is that your residence? A. Yes.

Q. Do you know the name of your mail carrier out there? A. No; I don't. I know what station it is.

Q. What station? A. Station at Broadway and Barrett Street.

Q. There was no definite understanding made with the plaintiff as to the pay? A. What do you mean by definite understanding? As to what?

Q. As to the amount you would be paid? A. There was no definite understanding as to what time he would stay with me. He did promise to repay me.

Mr. LANDIS. That is all.

Mr. AXTELL. That is all. Plaintiff rests.

(Plaintiff rests.)

Mr. LANDIS. Now, if your honor please, I move to strike out that part of the complaint that asks for maintenance and cure beyond the end of the voyage. There is no proof in this case as to the maintenance and cure and wages the plaintiff is entitled to.

The COURT. He said he spent money for his eyes, the condition of his eyes.

262 Mr. LANDIS. That was all done in Philadelphia afterwards, after he got out of the hospital. However, he said he paid the money—that he paid to this sister of his, he got three checks, $80, $75, and $65, and that was all paid to his sister.

The COURT. Did the plaintiff say what he actually paid on medical payments?

Mr. AXTELL. No.

The COURT. What is there in the case?

Mr. AXTELL. An expenditure of about $300, that he said he spent.

Mr. LANDIS. He paid it to his sister.

The COURT. Is that the only expenditure?

Mr. AXTELL. In Philadelphia. The rest of it is his cousin, and $150 that he said he paid out to doctors.

Mr. LANDIS. He did not say anything about $150 to the doctors. He said he got this money from the estate, the only money he had, and that was paid to his sister.

The COURT. Put him back on the stand.

BENJAMIN LUSTGARTEN recalled. By the COURT:

Q. Did I understand you to say you paid some doctors' bills out of this money? A. My sister helped me pay for that.

Q. The only money you expended then was the item of $18.65 and the item of $75? A. My cousin gave me the money for that.

Q. The only thing that you spent for board and lodging? A. $56 for medicine.

263 Q. Did you make any promise to your sister as to the repayment of this money? A. I was going to pay her when well enough to work.

Q. During what period were you living with her? A. From November—from April to December, 1926.

By Mr. AXTELL:

Q. And how much did you promise you would pay her? A. I promised I would pay her $10 a week.

Q. Do you owe her any money yet? A. I owe her for the whole six months.

Q. Six months? A. Yes.

Q. That is, this money that you gave out of your father's estate, or what belonged to you, was on the doctors' bills? A. She paid

doctors' bills, bought me this suit, shoes and socks, and things like that.

Mr. AXTELL. That is all.

Mr. LANDIS. That is all. I renew my motion on the ground that the right of this man to recover ended on his discharge from the marine hospital, and there is not any proof of any money paid by this plaintiff prior to the time he was discharged from the marine hospital; that at the time he was discharged from the marine hospital, was a reasonable time after the accident occurred in view of the fact that the man did not have tuberculosis at that time, and the ship was under no obligation to maintain him or take care of him.

The COURT. I will grant the motion and allow you (Mr. Axtell) an exception.

Mr. LANDIS. I renew my motion to dismiss the second cause of action on the ground that this man was given all the medi-
264 cal treatment that was necessary on board that vessel, and was given adequate care and attention.

The COURT. This motion has been argued at length—unless there is something new. I ruled on it before.

Mr. LANDIS. I will withdraw that.

The COURT. I will deny the motion and allow you an exception. I will say to the jury that during the recess the court ruled there can be no recovery in this case on the first cause of action; that there was no liability on the ship for the injury suffered at the time the accident occurred. That leaves only the second cause of action, which is based on an allegation that after the man was hurt he was ordered to work when he should not have been working, and that cause of action remains.

Mr. LANDIS. I would like to make a motion that the second cause of action be dismissed as against the second defendant, the Consolidated Navigation Company. Exhibit 4 introduced in this case is the operating agreement which shows upon its face that the Consolidated Navigation Company was not the agent.

Mr. AXTELL. There is nothing new in that motion. It has been ruled on by a dozen judges before, and they have always denied it. Their agent is not a disclosed agent to this plaintiff, and the courts have repeatedly held that under this contract both of these defendants are liable.

The COURT. As owners?

Mr. AXTELL. Yes.

265 Mr. LANDIS. That is not the case. The operator is not liable as owner. It has been held by the Circuit Court of Appeals that an owner may be held, not an operator.

The COURT. Motion denied.

Mr. LANDIS. And I take an exception. I move for a dismissal of the second cause of action on the ground that the United States of America owns this vessel, as shown by this operating agreement, and the United States Shipping Board Emergency Fleet Corpora-

tion is merely the agent of the United States in the operation of the vessel.

The COURT. Motion denied.

Mr. LANDIS. Exception. I should like first to introduce the naval record of Captain Lee.

Mr. AXTELL. I object to it as incompetent, irrelevent, and immaterial and hearsay and self-serving.

Mr. LANDIS. Under the hand and seal of the Secretary of the Treasury.

Mr. AXTELL. That does not make it material or relevant.

The COURT. How is it material?

Mr. LANDIS. The second cause of action alleges the brutality, the incompetency, and the cruelty of the master, and further alleges that this master is not the sort of a person to have on board such a vessel.

The COURT. Where does it allege anything of the kind?

Mr. AXTELL. Where does the word "brutality" and "cruelty" occur? It says negligence.

Mr. LANDIS. "Although plaintiff demanded that he be
266 furnished medical treatment and be allowed to be relieved from work, the same was refused him and he was compelled to and did work, and he sustained the injuries; when he asked to be relieved from duty and to be put ashore at the hospital, such request was refused," and states further that the said condition was known to the officers and master of said vessel.

The COURT. Objection sustained.

Mr. LANDIS. Exception. Now, if your honor please, I am going to read the deposition of Captain William H. Lee. It is a lengthy one, and I will try to pick out that part only which is relevant.

"Captain WILLIAM H. LEE, produced as a witness on behalf of the defendants, being duly sworn, testified as follows:

"Direct examination by Mr. LANDIS:

"Q. Captain, what is your profession? A. Master mariner.

"Q. What ship are you now master of? A. Motor ship 'Sawokla'.

"Q. When will she next be at New York? A. Probably in July.

"Q. Was there ever a man with you as a member of the crew by the name of Benjamin Lustgarten? A. Yes."

Mr. LANDIS. There is a copy of this deposition in the files of the clerk's office. The deposition was taken at Jacksonville and sent up to the court directly, the original. Shall I proceed?

267 The COURT. Yes.

Mr. LANDIS. This was taken March 31, 1927, at Jacksonville, Florida. [Continuing reading:]

"Q. How many voyages did he make? A. A portion of one voyage.

"Q. Do you recollect when and where you signed him on? A. I think at Baltimore.

"Q. Do you remember when? A. I think in January.

"Q. What year? A. 1926.

"Q. What did you sign him on as? A. Able seaman.

"Q. Was he later made second cook? A. He was.

"Q. When and where did that take place? A. At his own request, at either Avonmouth or Swansea.

"Q. Where are those ports? A. Avonmouth, England, or Swansea, Wales.

"Q. That was on this same voyage? A. Same voyage; at his own request.

"Q. What foreign ports did the 'Coelleda' make on that voyage? A. The ports of Manchester, Avonmouth, and Swansea, in the United Kingdom.

"Q. You went to Punta del Garda to, did you not? A. I did.

"Q. Any other ports besides those four? A. No other foreign port.

"Q. Where did you sign Lusgarten off? A. In the American consulate, before the American consul, in Punta del Garda, Azore Islands.

"Q. Did you sign the entire crew off there? A. No.

"Q. How did it happen that you signed Lustgarten off there? A. On the advice of a physician.

268 "Q. What physician was this, do you know? A. A physician who is the port health officer and who also has a civilian practice.

"Q. At Punta del Garda? A. Yes.

"Q. You signed him off before the American consul? A. Yes.

"Q. Do you recollect the date that this occurred? A. I think March 15th.

"Q. Did you pay him any wages at that time? A. He was paid his wages up to and including the date of discharge.

"Q. Did you make any arrangements with the consul at that time concerning Lustgarten, concerning who was to stand the expense for Lustgarten's keep while he was at Punta del Garda? A. No; I did not.

"Q. Have you seen Lustgarten since you paid him off, on or about March 15th? A. No.

"Q. Do you recall on what date you first knew Lustgarten was ill? A. Some days after sailing from Swansea.

"Q. Two days after? A. No; more than that.

"Q. Four days after? A. More than that. I believe about March 7th.

"Q. You are not certain of that date? A. No; I am not certain.

"Q. Did you have any conversation with Lusgarten concerning his illness? A. Yes.

"Q. Do you recollect when it occurred? A. I think that on March 7th I interviewed Lustgarten.

"Q. Was it the same day that you first knew that he was ill? A. Yes.

"Q. Do you recollect where this conversation took place? A. Near the galley, I think.

"Q. What did he tell you concerning his illness? A. He seemed to be——

269 "Q. No; what did he say? A. He didn't appear to know definitely what had caused his injury, or alleged injury, but gave us a supposition, in his statement to me, that he might have injured his chest by a lurch of the ship, causing his chest to strike the ship's rail.

"Q. Did he say anything about having slipped? A. No; he did not.

"Q. Did he say anything about having tripped on anything? A. No; he did not.

"Q. Did he tell you what he was doing at the time that his chest struck the rail? A. Yes; he said that he was dumping slops or garbage.

"Q. Did he say that he was dumping ashes at that time? A. I think that he made no reference at all to ashes.

"Q. Did he tell you that he had been hit by a wave? A. No; he did not.

"Q. Did he or did he not tell you that he had been struck by a wave? A. He said nothing about being struck by a wave.

"Q. Did he or did he not inform you at that time that he had been knocked unconscious? A. He said nothing about being knocked unconscious.

"Q. Did or not any one during that voyage tell you the plaintiff had been struck by a wave? A. Nothing was said to me by any one regarding Lustgarten having been struck by a wave or knocked unconscious.

"Q. As master of the 'Coelleda', were serious injuries reported to you—serious injuries to your crew reported to you? A. Absolutely.

"Q. What is the custom at sea, on a vessel of this type, concerning the master of the vessel being informed if a member of his crew is knocked unconscious while in the line of his duty? A. He is at once informed.

270 "Q. How many members of the crew of the 'Coelleda' were there after she left Swansea? A. Thirty-six.

"Q. You say that definitely? A. Yes—wait a moment; no, I am in error there; I had no steward. Thirty-five.

"Q. Did Lustgarten tell you on what day the accident occurred? A. He claims an accident to have occurred on the fifth.

"Q. Did he tell you the time of day it occurred? A. Not that I recall.

"Q. Did you see any marks on Lustgarten at this time? A. None whatever.

"Q. Was Lustgarten in bed? A. No.

"Q. Did he have any appearance of having been injured? A. No. He was carrying on with his work, and from all outward appearance was as well as ever.

"Q. Did you see him cough any blood at any time? A. No.

"Q. Did he say anything to you about an injury to his eyes? A. No; he did not.

"Q. Did his eyes appear to have been injured? A. Not at all.

"Q. Was any report made to you on that voyage that Lustgarten had injured his eyes? A. No.

"Q. Did Lustgarten say anything about any ribs being broken? A. No.

"Q. Was Lustgarten working at the time the vessel arrived in Punta del Garda? A. No. I had previously relieved him from duty.

"Q. Did he do any work after he reported the injury to you? A. He worked, I think, for a day or two.

"Q. Did he request to be relieved from duty? A. No. I relieved him of my own volition.

271 "Q. How did you happen to do that? A. Because I observed flecks of blood, or blood-stained saliva, on his shirt front; and while he claimed no serious illness, nor did he appear to have any serious illness, I deemed it prudent, because of these indications, to take him out of the galley and the handling of food. He also remarked I think that he at times felt dizzy to a slight extent. And so for those reasons I took him out of the galley; not at his request, but in absolutely my own judgment.

"Q. Did you ever order him to go back to work after that time? A. Oh, no.

"Q. To your own knowledge he didn't work after that time? A. I am positive that he did not.

"Q. The depositions of six members of the crew have been taken in New York, as witnesses for the plaintiff; all but one of them state that Lustgarten—that they saw Lustgarten working after the accident was supposed to have occurred. What have you got to say about that? A. Lustgarten probably did perform some duty for a day or two after I was informed of his alleged injury, in much the same manner as he had performed duty between the time of his alleged injury and the subsequent time that he reported that alleged injury to myself.

"Q. Was Lustgarten given any medical attention by you? A. No.

"Q. Do you know whether anybody on board did give him any medical attention? A. I believe that the second officer sought to make him comfortable.

"Q. How did it happen that you didn't give him some medical attention? A. Not being a medical man, I had an insufficient knowledge of medicine to properly diagnose the case, and so for that reason I could render no intelligent, skilled assistance to him.

"Q. Did you have any medicines aboard? A. We had the usual medicine chest.

272 "Q. When did you last secure medicines for this vessel, prior to the commencement of this voyage? A. Prior to the last voyage of the vessel.

"Q. As is the custom, upon the arrival of the vessel each voyage in her home port; that is to say, at Baltimore."

Mr. LANDIS. Apparently there is no answer. Skipping now to page 15. [Continuing reading:]

"Q. Did Lustgarten tell you where the alleged accident occurred? A. Yes; he mentioned the aft end of the house, and the rail; that is the end of this athwartship passage.

"Q. Do you know more definitely where it occurred? A. I don't know which side he claims. It is on that—I am referring to the aft end of the bridge deck; that is a space perhaps three feet wide.

"Q. When you sailed from Swansea, what was to have been your next port of call? A. New York.

"Q. Did you at that time intend to go to Punto del Garda, Azores? A. No; my ship was cleared for New York.

"Q. You did go there from Swansea, did you not? A. I did."

Mr. LANDIS. I will now skip several pages, to page 30. [Continuing reading:]

"Q. Do you recall the weather you encountered, captain, at the time you left Swansea, the weather that you encountered? A. Yes; heavy weather.

"Q. Do you recollect the wind force on the successive days after you left Swansea? A. On some days the velocity of the wind reached forces eight, nine, and ten of the Beaufort scale.

273 "Q. Did this weather persist; did that wind force persist? A. Not constantly; the wind moderated on some days."

The COURT. How is this material as the case now stands?

Mr. LANDIS. It is my contention that unless they can prove that this accident occurred, they are not entitled to recover under the second cause of action, because the second cause of action is based upon the claim that the accident occurred. It is not based upon sickness; it is based upon the claim that the accident occurred.

The COURT. What differences does it make whether there was an accident or not, if the man was sick?

Mr. LANDIS. Isn't this whole case predicated upon the accident? Is not the whole complaint based upon the accident? If your honor please, he has not stated a cause of action at all, unless he refers back to the first cause of action in which he alleges that this accident occurred, and reiterates the facts set forth there and repeats them with the same force and effect in the second cause of action as if set forth there at length, and he does not allege any negligence, and he does not allege any contract of employment.

The COURT. It is based on negligence. It is based on the neglect of the ship company to take care of him when sick.

Mr. LANDIS. We admit he was ill, oh, yes; we admit that he did get ill aboard ship; but that second cause of action does not allege the employment of this man as a seaman on board that vessel

274 unless we refer to the first cause of action. It does not state a cause of action unless you include the allegations made in the first cause of action.

The COURT. I will let it in, but it does not seem to me that it is material to talk about the weather.

Mr. LANDIS. I understood your honor to instruct the jury they can only find damages in the second cause of action if there was an accident.

The COURT. They may find for the plaintiff even if they thought the accident happened in some other way, and the man fell down. I do not instruct the jury that they have to find that the accident occurred precisely as he described it. I do not see that it makes any difference, unless it be your contention that the story is made up out of whole cloth, and you can rebut that by proving what actually happened.

Mr. LANDIS. That is what I want to do and I should like the opportunity to convince the jury that this whole thing is a fabrication.

The COURT. But what has the velocity of the wind to do with it?

Mr. LANDIS. I will leave this out, and prove whatever I want to prove in my direct case by these other witnesses. That is apparently all.

Mr. AXTELL. Can you call your next witness while I am reading over this deposition?

Mr. LANDIS. Yes.

275 PETER JOSEPH O'CONNOR, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. LANDIS:

Q. What is your occupation? A. Mariner.

Q. What ship are you now with? A. The steamship "Artegas."

Q. Is that a ship of the Shipping Board? A. Yes.

Q. Did you ever sail on the "Coelleda"? A. Yes, sir.

Q. Were you on the voyage during which this alleged accident occurred in March, 1926? A. Yes, sir; chief officer of the ship.

Q. Did you know Benjamin Lustgarten, the plaintiff? A. What?

Q. Did you know Benjamin Lustgarten, the plaintiff? A. I didn't know him until he came on the ship.

Q. But you knew him after he was on the ship? A. Yes.

Q. Did you ever have any conversation with Mr. Lustgarten around March 6th or 7th, 1927? A. On the morning of March 6th, when I came off duty at eight o'clock in the morning, I walked up around the ship to see that everything was all right, the usual practice.

Mr. AXTELL. I move to strike that out as not responsive.

The COURT. It may stand.

Q. Just answer by yes or no, and then I will ask you what the conversation was. A. Yes.

Q. What conversation did you have? Where did you have this conversation? A. At the galley door.

276 Q. What time was this conversation? A. About five minutes past eight in the morning.

Mr. AXTELL. I object to that and move to strike it out unless it be shown whether it was before or after the accident.

Mr. LANDIS. It is stated that he talked with him on March 6th.

The COURT. Objection overruled.

Q. What was said in this conversation? A. Lustgarten told me he was not feeling good, and was spitting blood. I asked him what was the matter with him, and he said he didn't know. He said, "I sprained myself." I said, "Anything else?" He said, "Not that I know of." I said, "You have got consumption then."

Q. What did he say? A. He said that was a nice thing to say to a young fellow twenty-three years of age.

Q. Did you witness any accident to Lustgarten on this particular trip? A. No, sir.

Q. What is your watch? A. 4 a. m. to 8 a. m., and 4 p. m. to 8 p. m.

Q. And you were on watch at the time between six and seven in the evening? A. Yes, sir.

Q. Was that every day? A. Every day.

Q. That was on March 5th? A. On March 5th.

Q. Where are you when you are on watch? A. On the bridge.

Q. How unusual is it for a wave to come up over the after end of the amidships house; unusual enough for you to remember it?

Mr. AXTELL. I object.

Mr. LANDIS. This is a hypothetical question asked of a man that has been at sea.

277 Q. How often have you seen a wave come up over the after end of the amidship section of the house? A. I never saw any.

Q. Of the "Coelleda" or any ship? A. I have seen it come over an Isherwood ship.

Q. Never over the "Coelleda"? A. No.

Q. And you can say definitely none came up over the "Coelleda"? A. Not over the amidship section, no.

Q. Did you have any spray come up? A. Spray flies over the ship.

Q. What is the nature of the spray, heavy spray or light spray? A. When the sea rises and the wind is blowing, the top of the sea flips up and the wind catches that and splashes it over the ship, like a heavy shower of rain.

Q. Did you ever see Lustgarten working after he had this conversation with you? A. No, sir.

Q. Do you know whether he was relieved from duty? A. Yes, he was relieved from duty.

Q. You know that of your own knowledge? A. Yes.

Q. Do you know what date he was relieved? A. I can not say, a day or so after it was reported to me, though.

Mr. LANDIS. That is all.

Cross-examination by Mr. AXTELL:

Q. Have you been working for the defendant ever since this accident happened? A. Yes, sir, the United States Shipping Board, if that is the defendant.

Q. Do you expect to continue in their employ? A. Yes, sir, if they will keep me.

Q. Have you been talking this case over, what you would testify to, before you came up here? A. No, sir.

Mr. AXTELL. That is all.

(Witness excused.)

278 RAYMOND P. ABBOTT, called as a witness on behalf of the defendants, being first duly sworn, testified as follows:

Direct examination by Mr. LANDIS:

Q. Mr. Abbott, what is your present occupation? A. Insurance.

Q. Where? A. Boston, Massachusetts.

Q. Do you live in Boston? A. I live in Newburyport.

Q. How long have you been in the insurance business? A. About eight months.

Q. Have you ever been at sea? A. Yes, sir.

Q. Have you ever sailed on the "Coelleda"? A. Yes, sir.

Q. In what capacity? A. Second mate.

Q. Were you on the "Coelleda" in March, 1926? A. Yes, sir.

Q. In the capacity of second mate? A. Second mate; yes sir.

Q. Do you remember Benjamin Lustgarten, the plaintiff in this action? A. I do.

Q. Did you ever see any accident to Lustgarten during that voyage? A. No, sir.

Q. Did you ever have any occasion to make any physical examination of Lustgarten during that voyage? A. I did.

Q. Were you the officer who attended to the medical needs of the seaman aboard the ship? A. Yes.

Q. What date did you make this physical examination? A. About—I am not sure about the date—about March 6th or 7th.

Q. How did it happen you made a physical examination? A. Lustgarten came around to my room.

279 What did he say to you? He said he had been hit by a wave and had a pain in his chest and a cough.

Q. Did he say how he was hit? A. I am not sure whether he said he was struck by a wave or not, but he did tell me he had a cough.

Q. What did you do? A. I took him around to the hospital for an examination.

Q. And what did you find in that examination? A. I could not find anything, no bruises showed, but he did have a cough, and his tongue was coated, and a slight fever.

Q. Did he have any blisters on his back? A. No blisters on his back.

Q. Did he have any mark or scar on his head? A. No.

Q. Did he have any swelling to his jaw? A. No.

Q. What did you do for him at that time? A. I told him to turn in, and I gave him a physic; I told him not to worry.

Q. What did you do then? A. I went on watch.

Q. When did you next see Lustgarten after that? A. The next morning.

Q. Where did you see him? A. Down in the hospital.

Q. Was he still in the hospital at that time? A. I don't remember whether he was up around or whether he was in the hospital.

Q. And you reported to the captain in the meantime? A. I told the captain that morning.

Q. That morning after you saw him in the hospital the second time? A. After I saw him in the hospital.

Q. Do you remember the condition Lustgarten was in the second morning? A. He said he was feeling all right.

Q. When did you next see him after that? A. I saw him that night.

280 Q. Where was he then? A. He was up around; he was standing in the passageway about 5 o'clock. He had on an undershirt and a pair of pants.

Q. Did you give him permission to get up? A. No, sir.

Q. Did you order him to go back to bed? A. I did.

Q. Did he go? A. He did not.

Q. What did you do when he did not return to bed? A. Nothing I could do. He stayed up until he wanted to turn in himself.

Q. When did you next see him? A. That same night.

Q. What time? A. About 7 o'clock.

Q. Seven o'clock in the evening? A. Yes.

Q. Where was he then? A. In the hospital.

Q. What condition was he in? A. He was not feeling very good, he said.

Q. Did you do anything for him? A. I gave him another physic, as he said the one I gave him the night before had not worked, and turned him in in plenty of blankets, so he was warm.

Q. Then you left him? A. I left him.

Q. When did you next see him? A. The next morning.

Q. The next morning? A. Yes.

Q. Can you recollect the dates, approximately? Do you know what date this is now? A. No; I would not say the date; it would be the day after the first——

Q. (Interrupting.) This is the first day after now, isn't it, or the second day after he first came to you? A. Yes; the second day

Q. (Interrupting.) This is the first day after now, isn't it, or the first.

281 Q. And he was up and around again? A. That morning he was up and around again, yes.

Q. Did you order him to go back to bed that day? A. I did.

Q. What happened then? A. He said he was feeling better. He said he would stay up.

Q. When did you next see him? A. That night.

Q. Where did you see him at that time? A. Down in the hospital, about half past four in the afternoon, after I came off watch. He had been working that afternoon.

Q. He had been working that afternoon? A. Yes.

Q. Did you order him to go to work? A. No.

Q. Did he tell you why he had been working that afternoon? A. He said he just went into the galley to help the cook out.

Q. He said that to you then? A. Yes.

Q. How was he feeling then? A. He did not feel very good.

Q. What did you do for him? A. He had a slight fever, and I gave him spirits of nitre that night and turned him in.

Q. When did you next see him? A. At four o'clock the next morning.

Q. Where did you see him then? A. Approximately four o'clock, about a quarter past four.

Q. Where did you see him then? A. He was sitting up in his bunk, with a port open, and the wind blowing on him, and choked with phlegm, and could not hardly breathe.

Q. What did you do? A. I got a hot water jug and put it in with him and cover him up with blankets and closed the port.

Q. When did you next see him? A. That same morning.

282 Q. Where was he then? A. He was in the hospital or around the hospital.

Q. How was he feeling? A. Not very good.

Q. When did you see him after that? A. That same afternoon.

Q. Where was he then? A. He was sitting up in the hospital.

Q. Did you give him any further medical treatment besides that you have already testified to? A. No, because after that he seemed to get along all right; that is, as well as he could.

Q. Do you know of your own knowledge whether or not he worked at any time after the one period that he worked when you say that he worked himself? A. I don't know of any other period.

Q. Do you know whether he was relieved from duty as second cook eventually? A. Why, he did not go into the galley after that night when he came up to me except that one afternoon.

Q. Did he ever complain any about his eyes? A. He said just before he got into Punta del Garda, that he could not see very well; his eyes bothered him at times.

Q. Did he say anything about any ashes? A. No, sir; he never told me anything about ashes.

Q. Did he ever complain of anything being in his eyes? A. No.

Q. The plaintiff has introduced and exhibited here an affidavit of the plaintiff in this action in which it is stated that the captain kept on saying, "Give him another dose of salts," but Mr. Abbott, the second officer, said, "Captain, you will kill him if you keep giving him Epsom salts," and the captain said, "That is what I want to do."

Mr. AXTELL. I object on the ground he is trying to impeach his own evidence.

283 Q. Is there any truth in that statement? A. No, sir.

Mr. AXTELL. I object to it on the ground he is impeaching his own evidence.

The COURT. The form of the question is objectionable. Did that happen?

The WITNESS. No, sir; that did not happen.

The COURT. Did you ever hear the captain say that?

The WITNESS. No, sir.

Q. Did you ever take Lustgarten to the bridge of that vessel to see the captain? A. No, sir.

Q. Were you ever present when the captain was with Lustgarten? A. No, sir.

Q. Did Lustgarten ever say anything to you about the captain having made him go to work? A. No, sir.

The COURT. Did the captain ever order him back to work?

The WITNESS. No, sir.

Q. You never saw Lustgarten unconscious, did you? A. No.

Mr. LANDIS. That is all.

Mr. AXTELL. I move to strike out the last answer as being an answer to a leading question.

Mr. LANDIS. That is a little late.

The COURT. Motion denied.

Mr. AXTELL. May I have official log?

Mr. LANDIS. Yes [producing paper].

284 Cross-examination by Mr. AXTELL:

Q. Will you read that entry of March 15 and see if that refreshes your recollection? A. Do you want it read out loud?

Q. I ask you to read it.

Mr. LANDIS. Mr. Abbott, you did not make that log, did you?

The WITNESS. No.

Mr. LANDIS. I object to it.

The WITNESS. No; I did not make the entry.

Q. Did you see it? A. No.

Q. You never saw it before today? A. No; I did not see that entry. I never saw the official log book except when I signed for my wages.

Q. Well, have you gone over your testimony—what you are going to say here on the witness stand—before coming in? A. No, sir; I am just stating the facts.

Q. You have not talked it over at all? You could not talk it over with a lawyer and still state the facts, could you? A. Surely.

Q. What did you mean by that remark, "I am just stating the facts"? A. Stating the truth.

Q. Couldn't you talk to a lawyer before trial and still tell the truth? A. Yes.

Q. Why did you deny you talked this over with counsel before going on the witness stand? A. I have not denied. Please repeat the question.

Q. He is sitting here and listening to your answers. Why did you deny it? A. I did not deny talking it over with the counsel before I came on the witness stand.

Q. You did not? A. No.

Mr. AXTELL. That is all.

285 Redirect examination by Mr. LANDIS:

Q. Did you accompany Mr. Lustgarten to the hospital at Punta del Garda? A. I did.

Q. Did Lustgarten have any aid in getting him down the ladder alongside of the ship? A. No, sir.

Q. Did he have any assistance in going through the streets of Punta del Garda? A. No, sir.

Mr. LANDIS. That is all.

Mr. AXTELL. That is all.

Mr. LANDIS. I would like to introduce this log book.

Mr. AXTELL. I would like to recall the man and ask him one question.

Mr. LANDIS. I want to put in the log book.

PETER JOSEPH O'CONNOR recalled.

Mr. AXTELL. I want to call this witness back.

Mr. LANDIS. This is not your case.

The COURT. Next question.

Mr. AXTELL. I recalled this witness, I understood, to question him.

The COURT. Question him then.

Mr. AXTELL. His counsel says he is going to do it first.

The COURT. If he wants to question him, let him to it.

Mr. AXTELL. I want a ruling, that is all. If your honor rules that way, very well.

The COURT. I do.

Mr. LANDIS. Are you willing to concede that this is the log?

286 Mr. AXTELL. I never looked at it, and I won't concede it in evidence.

By Mr. LANDIS:

Q. I hand you this book and ask you what it is? A. That is the log book of the ship. In other words, as the chief officer of the log book, to keep an entry of the log, written up by each of the three officers aboard the ship, the performance of the ship, the weather, the course steered, etc.

The COURT. That is enough of that.

Q. What period of the voyage of the "Coelleda" does that cover? A. From January 20, 1926, to April 2, 1926.

Mr. LANDIS. I offer it in evidence.

Mr. AXTELL. You offer the log in evidence?

Mr. LANDIS. Yes.

Mr. AXTELL. I object to it.

The COURT. Objection sustained.

Mr. LANDIS. So much of it as is pertinent.

The COURT. Objection sustained.

Q. What were the weather conditions that existed on March 5, 1926, at six o'clock p. m.? A. The weather on March 5 had calmed down. On March 2 we had a gale, a force of about 9 to 10. On

March 3 the wind was about 6, and on March 4 about 5, which was a moderate gale.

Q. Are you sure of that? A. I am not quite sure, but at the beginning of March, the first or second day of March, I can not say just exactly whether the second or third, but the beginning
287 of March, we ran into a heavy gale, and two or three days later it subsided and the sea started running down.

Q. Can you refresh your recollection from this log as to the weather conditions you encountered during that period? A. Yes.

Mr. AXTELL. I object on the ground his recollection does not need refreshing.

The COURT. There is a little uncertainty as to the dates. You can look at the log.

Q. Turn to the entry under March 5. Does that refresh your recollection concerning the wind force between four and eight that night? A. Yes.

Q. What was the wind force blowing? A. On the afternoon of March 5?

Q. Between four and eight o'clock? A. From four to six, moderate to fresh breeze.

Q. And from six to eight? A. From six to eight the same thing, a fresh breeze.

Q. Is that a heavy wind? A. No; termed about 18 to 20 miles an hour, or 25, something like that, what we term it.

Q. What weather conditions did you have in the morning of that day? A. In the p. m.?

Q. No; in the morning. A. In the morning it was heavier; at four o'clock in the morning, you mean?

Q. No; from six o'clock—six a. m. March 5, to noon? A. Well, it was moderating down from about four to seven, moderate gale to a moderate breeze.

Q. Do you recollect the nature of the sea running at that time? A. It was north-northwest sea.

Q. Was it a high sea? A. No; it was a heavy swell, coming down from a gale of wind, running into a heavy swell.

Mr. LANDIS. That is all.

288 Cross-examination by Mr. AXTELL:

Q. How many days does it take you to get from Swansea to New York?

Mr. LANDIS. If your honor please, I object to that on the ground it is immaterial, irrelevant, and incompetent.

The COURT. This witness was not recalled on that.

Mr. AXTELL. This is all new matter. He did not go into this on his direct.

Mr. LANDIS. I have a right to recall my witness.

Mr. AXTELL. Then I have a right to cross-examine him. He said they had moderate weather, and I want to find out; I will be very brief.

The COURT. How many days from Swansea to New York?

Q. How long did the voyage last?

Mr. LANDIS. I object to that.

The COURT. I will let him answer.

The WITNESS. I will have to look up the log book.

Q. You know it was 28 days, don't you, without looking up? A. No.

Q. You will never forget that voyage, will you? A. A. Yes; I have had worse ones than that.

The COURT. I think you are all somewhat out of order. Next question.

Q. Mr. O'Connor, do you mean to tell me you don't know without looking at the log book how many days it took you to
289 cross the Atlantic on that trip? A. I have made so many trips across, Mr. Axtell, that I can not tell you, this voyage or the last voyage, or the other voyage.

Q. Do you remember the voyage when that wire got tangled up and took the cover off your fresh water tank and you put into Azores?

Mr. LANDIS. This is immaterial and has been ruled out.

Mr. AXTELL. I want to show there was a rough sea.

Mr. LANDIS. I object to that.

The COURT. Next question.

Q. Look at this log entry, the 15th, is that your own handwriting? A. As far as signing chief officer, yes.

Q. Is that correct, the one on the 15th, concerning Lustgarten? A. He didn't make that statement to me; that was made to the ship.

Q. The log entry, you signed it, didn't you? A. That might be made in Punta del Garda.

Q. That is your signature, isn't it? A. That is just a customary thing on the ship.

Q. Answer the question? A. That is my answer.

Q. And that is the captain's signature, isn't it? A. Yes, sir.

Mr. AXTELL. I want to read it.

Mr. LANDIS. Just a minute. Is this offered in evidence?

The COURT. You can not read it.

Mr. AXTELL. I offer that entry of March 15 in evidence.

Mr. LANDIS. No objection.

Mr. AXTELL. It reads: "March 15 Punta del Garda, Azores,
290 paid off B. Lustgarten, second cook, before U. S. consul, for medical treatment, Lustgarten claims that a lurch of the ship at sea on March 5 caused his chest to strike the rail, causing injury to his lungs."

Q. Now, is there any entry in this log about what he told you? A. I will have to look it over.

Q. As to how he got hurt, and his other sickness or whatever it was? A. I don't see any.

Q. How many days did it take you from Swansea to Punta del Garda? You left there February 28th, didn't you? A. Twelve days.

Q. What was the date of leaving?

The COURT. Leaving where?

Q. Leaving Swansea? A. On Wednesday, March 3.

Q. When did you get to Punta del Garda, the 15th? A. On the 15th.

Q. When did you reach Staten Island, New York? A. March 29th.

Q. How long—what is the speed of that boat ordinarily? A. About a 10-knot vessel.

Q. She crosses that distance ordinarily in about ten days, doesn't she? A. No, sir.

Mr. LANDIS. I object to this question.

The COURT. Objection sustained.

Q. You had rough weather the whole trip according to your log, didn't you? A. On and off, yes.

Q. You don't want the jury to infer that if the wind subsides, the sea immediately subsides also? A. Four hours later, it only takes four hours to run down, and four hours to come up.

291 Q. It depends on where it is, doesn't it? A. Not necessarily; no.

Q. It depends on where the ship is? A. Not necessarily.

Q. It depends on the direction of the wind, doesn't it? A. It depends on the velocity of the wind, not its direction.

Q. If you are off the coast of North America and the wind is from the shore and the wind subsides, the sea subsides very quickly, doesn't it? A. Not any more than the middle of the ocean.

Q. If the wind is coming from the sea and you are offshore, it takes a long time for the sea to subside, doesn't it? A. You don't have any sea, if the wind is coming from inshore.

(Witness excused.)

Dr. CLARENCE M. MCPEAK, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. LANDIS:

Q. Doctor, what is your profession? A. Physician.

Q. Where are you practicing? A. At present in the University of Virginia Hospital.

Q. When did you graduate? A. In 1925.

Q. In 1925? A. Yes.

Q. Have you ever been stationed in the United States marine hospital at Staten Island. A. Yes.

Q. Have you ever had anything to do with Mr. Lustgarten, the plaintiff in this action? A. Yes.

292 What connection did you have with him? A. He was a patient on my ward in the marine hospital.

Q. At the marine hospital? A. Yes.

Q. Did you take this patient's history? A. Yes, sir.

Q. Do you recollect what Mr. Lustgarten's chief complaint was when he entered the marine hospital? A. The chief complaint was blindness in the left eye, or blindness in one eye, I don't remember which, and pain in the other.

Q. Did he complain at all about his chest and lungs? A. He complained some, he had pain in the chest.

Q. Any other complaint? A. He said he would spit up some blood at times, he said he lost 32 pounds in weight.

Q. He said he lost 32 pounds in weight? A. Since the accident.

Q. He remarked that accident to you, did he? A. Yes.

Q. Do you remember what he told you occurred? A. All I recall was that he said a wave hit him and knocked him against the rail.

Q. Do you recollect whether he said anything about a cough? A. He said he had a cough, but it came on only in the last few days, since he had a cold.

Q. He said that, did he, to you? A. Yes.

Q. How old did he tell you he was? A. Twenty-three.

Q. I hand you this record and ask you what it is [handing paper to witness]? A. That is a record of the patient Benjamin Lustgarten in the Marine Hospital No. 21.

Q. Would that refresh your recollection any? A. Yes, sir.

293 Q. In the event you don't remember exactly these things I am asking you? A. Yes.

Q. Did you treat this patient the entire time he was at the marine hospital? A. With the exception of possibly the last two or three days, I was sick myself.

Q. What treatment did you give him? A. As far as actual treatment, it was not much, mostly diagnosis.

Q. Did you make the diagnosis? A. Yes, sir.

Q. What diagnosis did you make? A. The diagnosis of malingering.

Q. How did you arrive at that diagnosis? A. His chief complaint, I diagnosed the eye; his chief complaint, I could not find anything myself, and had one of my consultants, Dr. Boland, see him, and he took him over to New York.

Mr. AXTELL. I object to what the other doctor did unless he was there at the time.

The WITNESS. I was not there.

Q. What else? A. The examination of the chest I did myself, and found out there was not anything wrong.

Q. Nothing wrong with his chest? A. I could not find anything wrong.

Q. What date did you make that examination? A. Made on the 6th day of April, that is the date he was admitted.

Q. Did you examine his chest at any other time? A. I don't think I did, he had an X-ray examination of the chest.

Adjourned until Friday, June 17, 1927, at 10.30 o'clock a. m.

294 NEW YORK, *June 17, 1927.*

Dr. CLARENCE N. MCPEAK, resumed the stand.

Mr. LANDIS. I am finished with the witness.

The COURT. Then he is your witness, Mr. Axtell.

Mr. AXTELL. And this is cross-examination.

Cross-examination by Mr. AXTELL:

Q. About how long have you been practicing, Doctor? A. Two years.

Q. Are you still associated with the marine hospital? A. No.

Q. How long were you over there? A. One year.

Q. One year? A. Yes.

Q. Where were you the year before that? A. I was in medical school the year before that.

Q. In which? A. The medical school.

Q. A little louder, Doctor. A. Medical school.

The COURT. Medical school.

Q. You have no impairment of speech, Doctor, have you? A. Not that I know of.

Mr. AXTELL. That is all.

(Witness excused.)

295 PETER BARTH, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. LANDIS:

Q. Mr. Barth, what is your occupation? A. Letter carrier.

Q. You carry letters in Brooklyn? A. Yes, sir.

Q. You are regular letter carrier of the United States mails? A. Yes, sir.

Q. Do you carry letters to 19 Thorpe Street, Brooklyn? A. 19 Throop Avenue.

Q. Throop Avenue? A. Yes.

Q. Do you recognize Mr. Lustgarten, the plaintiff, A. I do.

Q. Have you ever carried any letters or delivered any letters to Mr. Lustgarten at 19 Throop Avenue? A. Yes, sir.

Q. When have you done this? A. I delivered one, one letter at 19 Throop Avenue.

Q. What date was that, do you remember? A. On April 30th, on a Saturday.

Q. This year or last year? A. This year.

Q. Will you tell the jury what happened when you delivered that letter? A. Well, the letter was given to me to be delivered personally, and I entered the place and called the name, and a voice says "All right." I said "I must see Mr. Lustgarten," and the voice called, "Benny, Benny," and the door opened and Mr. Lustgarten came down the stairs and I handed him the letter, and I asked him if there was any such party with him. He looked at it and he said, "Lustgarten, that's my name," and he walked back.

Q. How was the light where this all took place? A. Well, it is not very dark and not very light, you know, about—I judge about the average tenement.

296 Q. Just about what? A. The average tenement house, old fashioned house.

Q. A hallway, is that it, an ordinary tenement house hallway light? A. Yes, sir.

Q. Did you look at this address and the name there; did you notice the script and the nature of the script? A. Well, Lustgarten's name was wrote in pencil.

Q. Written in pencil? A. Yes.

Q. Was it in big characters or small characters? A. About the regular writing, the average writing.

Q. Would you say it was easy to read or difficult to read? A. Not so very easy. It was not very easy to read.

Q. What? A. I say it was not very easy to read.

Q. It was rather difficult to read; is that the answer? A. It is; yes.

Q. Where did you hand Mr. Lustgarten this letter? A. What is that?

Q. Where was Mr. Lustgarten when you handed him this letter? A. He came down the stair. On the stair.

Q. How far down the stair was it? A. About half way.

Q. How did he come down the stair? A. I judge about six steps, something like that.

Q. How did he come down the stairs; in what manner or at what gate? A. He came down at a fast gate.

Q. Did he walk down slowly? A. No; he came down fast.

Q. He came running down? A. Yes, sir.

Q. Did he have any trouble; did he grope for this letter or did he receive it as anybody would receive it? A. He reached for the letter and looked at it, and said, "Lustgarten, that's my name." I did not notice anything.

Mr. LANDIS. That is all.

297 Cross-examination by Mr. AXTELL:

Q. Was that the first letter that you ever delivered to him personally? A. Yes, sir.

Q. Look at that letter and tell me if that is it [handing witness]? A. That was not the letter.

Q. What? A. That was not the letter.

Q. That wasn't it? A. No.

Q. How do you know so quickly that that wasn't it? A. Well, I know because it was not that name on there at all.

Q. What is that name on there? A. I will have to use my eyeglasses to see that.

Q. Well, supposing you look at it. A. "Benny Lustgarten, care of Axtell, 11 Moore Street, New York City." That was not the letter.

Q. You are looking at the address now, but what name is it? A. Lustgarten.

Q. You are sure that was not the letter? A. Exactly.

Q. Who is that letter from? A. I don't know who it was from. The boss gave it to me.

Q. Who is the boss? A. My superintendent.

Q. What is his name? A. Mr. Cunningham.

Q. Is he in the Post Office Department? A. Yes, sir.

Q. Did you ever go to 45 Broadway in your life? A. 45 Broadway? This place here? No, sir; this is the first time I have been here.

Q. This is not 45 Broadway. A. Oh, excuse me.

Q. Have you been down to this lawyer's office? A. It is the first time I have been here today.

Q. You have never been to his office? A. This is the first time today.

Q. You are sure of that? A. Yes, sir.

Q. You have never been to 45 Broadway? A. Never.

298 Q. Do you know who is there? A. I do not.

Q. Did you ever hear of the United States Shipping Board Emergency Fleet Corporation? A. That is the Government.

Q. You are working for the Government, too, are you not? A Yes, sir.

Q. Have you been there to their office? A. Only once, today.

Q. At the time that you delivered this letter did you know there was some particular reason for wanting you to deliver this letter to Lustgarten? A. I was told to see Mr. Lustgarten.

Q. Were you told to observe? A. Yes.

Q. And report what you observed? A. Yes.

Q. Did you or did you not, when you took the stand first, say substantially this: "I went up to the apartment"—I will withdraw that. Will you again tell me just what occurred when you went to the house. A. I entered the hall and called the name Lustgarten, and the voice called, "All right," and I said "I must see Mr. Lustgarten," and then the voice called "Benny, Benny," and a door opened and Mr. Lustgarten came down the stairs and I handed him the letter.

Q. And what? A. He looked at the letter and said, "Lustgarten, that's my name."

Q. And he went back? A. Yes, sir.

Q. How was he dressed? A. He was in his BVD's.

Q. That is right. Now you did not say anything then about running, did you, just now? A. No; he came down the stairs.

Q. You did not say anything about running just now, did you, and you did not say anything about running the first time you were questioned by the lawyer about it, did you? A. No, sir.

299 Q. And that was the truth; he just came down the stairs and got the letter and walked up again, didn't he? A. He came down the stairs.

Q. Then why did you say in answer to his question that he hurried and ran back up the stairs; why did you change your testimony? A. I did not say he ran back up the stairs.

Q. Have you been talking this over with somebody before you went on the stand to-day?

The COURT. Let him answer the question. What was your explanation, he did not say what?

The WITNESS. I say he did not run up the stairs. He came down the stairs fast.

Q. But you did not say that at first? A. Yes, I did.

Q. Have you been talking this over with anybody before you went on the stand? A. Yes; I was over it.

Q. Did you make a report of this occurrence to somebody? A. Just the way I reported it here.

Q. Did you report that letter incident to somebody afterwards, the manner in which—— A. (Interposing.) Oh, yes.

Q. To whom did you report it? A. Mr. Mayberry.

Q. Who is Mr. Mayberry? A. That is one of the officers from the United States Shipping Board, I believe.

Q. When did you make the report? A. Right after I gave him the letter, that same day.

Q. Then you did know you were going there to see if you could observe something? A. Yes.

Q. And make a report? A. Exactly.

Q. You were the regular mail man on that beat, were you not? A. Yes, sir.

300 Q. And you had gone there many times before? A. Never that house. Not there. I do not deliver any letters at that house.

Q. Oh, you are not the regular mail man on that beat? A. I am, but we do not deliver any letters at that entrance.

Q. Have you ever done this before? A. No, sir.

Q. For the defendant, in other cases? A. No, sir.

Q. Do you make a practice, as a postman, of acting as a detective for private corporations? A. No, sir.

Q. And have never done that in any other instance? A. No, sir.

Q. You did not know you were working for a private corporation in this instance, did you? A. Yes, I did.

Q. Then you knew when you went there that you were to try to get some evidence? A. I was told to deliver that letter and look at Mr. Lustgarten.

Q. And what were you paid for your services in that regard? A. Nothing.

Q. What do you expect for this extra service? A. Nothing.

Q. That does not come within your duties as a civil service employee of the United States? A. Nothing.

Q. You do not expect anything? A. No, sir.

Q. Do you expect promotion? A. No, sir.

Q. Do you expect to be recommended for promotion? A. No, sir.

Q. Who is the person who would recommend you for promotion or better pay or something, if such were to come your way? A. My superintendent.

Q. And who is the superintendent that sent you to this job? A. Mr. Cunningham.

Q. The same man? A. Yes.

(Witness excused.)

301 Dr. GRANT THORBURN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. LANDIS:

Q. Dr. Thorburn, what is your profession? A. I am a physician.

Q. Have you a specialty? A. Yes, sir; I do tuberculosis work.

Q. You are a specialist in tuberculosis? A. Yes, sir.

Q. Where are your offices? A. 379 Park Avenue.

Q. Have you ever examined the plaintiff, Mr. Lustgarten, sitting over there [indicating]? A. Yes, sir.

Q. What did you examine him for? A. I examined him to—examined him particularly—a physical examination on him to find out whether or not I could find any evidence of pulmonary tuberculosis.

Q. Did you find any evidence of pulmonary tuberculosis? A. I did not.

Q. What connections have you with hospitals and other institutions of this city? A. I am on the staff of Bellevue Hospital, on the tuberculosis service, assistant attending physician; I am visiting physician at the Otisville Sanitorium; I am on the medical board of the Loomis Sanitorium, secretary of the medical board; I am on the medical board at Stonewall Sanitorium and one of the examiners for those sanitoria, and also the Trudeau Sanitorium at Saranac Lake. I am the consulting tuberculosis physician to the Rockland County Sanitorium at Summit Park, New York. Is that enough?

302 Q. Yes. How long have you practiced your profession, Doctor? A. I graduated in 1913.

Q. How long have you specialized in tuberculosis? A. Since the war in 1917. During the war and since then.

Q. How many examinations have you made of Mr. Lustgarten? A. I have examined him twice.

Q. What did your first examination consist of? A. I examined him with a stethoscope, examined his nose and throat, and I looked at him the first time.

Q. What was your conclusion after that examination? A. I was unable to find evidence of pulmonary tuberculosis. By that I mean a pulmonary tuberculosis which would give symptoms.

Q. However, you were not sure at that time; you were not able to make a definite diagnosis, by reason of the fact that you did not have a chance to examine him fully? A. That is right.

Q. When did that examination take place? A. The first one?

Q. Yes. A. Can I look at a card that I have here?

Q. Yes. A. I examined him first on the 4th of April.

Q. April 4th. When did you examine him again? A. I examined him again on the 12th of April.

Q. Both of those dates are in 1927, are they not? A. Yes, sir.

Q. Where did you examine him the second time? A. At the Post Graduate Hospital.

Q. And from this examination you arrived at the diagnosis that this man had not tuberculosis; is that right? A. As far as I could go at that time. He subsequently——

Q. (Interposing.) Oh, you—— A. (Interposing.) We took some further tests later.

303 Q. What other tests did you make? A. Took a pair of stereoscopic plates of his chest at the office.

Q. From that and various other examinations you arrived at the definite diagnosis? A. Yes, sir.

Q. That he has not pulmonary tuberculosis? A. ——

Cross-examination by Mr. AXTELL:

Q. What is the matter with him, Doctor? A. I don't know what is the matter with him.

Q. Well, is he perfectly healthy and normal and well? A. I do not think he is; no. Not if his——

Q. (Interposing). Doctor, if he was healthy and well and normal when he joined this ship in January, 1926, and had an accident on the 5th of March, by being struck by a sea and a heavy can falling on him full of ashes, bruised in the lungs and chest, that afterwards when he started to work spitting quite a quantity of blood, had a hemorrhage, as has been described by the witnesses, and then after that from time to time was spitting blood, lost weight, was in the condition that you saw him the other day—would you say that his changed condition was in any way connected with the accident—that is, assuming that it happened? A. You mean his changed condition is——

Q. (Interposing.) Yes, do you think the accident would have anything to do with his changed condition, assuming those facts to be true?

Mr. LANDIS. If your honor please, I object to this on the ground it is outside of the direct examination and outside the issues as brought up by direct examination. This hypothetical question deals with matters that I did not deal with in the direct examination.

304 Mr. AXTELL. I will risk making him my witness on that point, if your honor feels that this is outside the cross.

The COURT. I will sustain the objection unless you do.

Q. All right; will you answer the question, doctor? A. I have to have that question a little clearer. I do not know just what it is that you are trying to ask me.

Q. Well, is a trauma ever a competent producing cause of tuberculosis? A. It does not produce tuberculosis—trauma.

Q. Well, is it the exciting cause of activity of tuberculosis? A. It might be the exciting cause of a reactivation of chronic tuberculosis.

Q. The theory of tuberculosis commonly accepted is that the germ is—— A. (Interposing). The tubercle bacillus.

Q. Tubercle bacillus, is it? [Continuing:] Is in most people's mouths and lungs, isn't it; that is, that they get it in the mouth—— A. (Interposing). I would not say it is in most people's mouths but it is in most people's systems, and they take it in.

Q. Yes; and an injury to a knee joint sometimes results in a tubercular infection? A. Some authorities claim it does and other orthopedic authorities say it does not.

Q. What do you think about it? A. It has never been proved to my satisfaction that trauma developed tuberculosis. I am not an orthopedic; I do not do orthopedic work.

Q. You just specialize in—— A. (Interposing). Pulmonary tuberculosis.

Q. I see. Men do, you find in cases of autopsies performed,
305 find evidence of the tubercle bacillus in the lungs in the body of the person, do you not? A. Proof that he died of something else.

Q. Yes. A. We frequently do in a very large percentage of people.

Q. And the germ has made no headway and as a disease it has not progressed; that is true, isn't it? A. That is right.

Q. That is true with reasonable certainty of living human beings; probably a number of us in the court room—— A. (Interposing.) I think most of us have.

Q. In the lungs now? A. Yes.

Q. Would an injury to the lungs or the diaphragm or the tissues of the ribs be a competent producing cause of reduction of the vitality or resistance of the patient or person to such an extent as to permit the tubercle bacilli to become active and lead to tuberculosis? A. Yes.

Mr. AXTELL. That is all.

The COURT. May I suggest that that does not go far enough in this case, because I have ruled that the ship is not responsible for the injury. If you want to leave it there, all right.

Mr. AXTELL. I have made my case.

The COURT. All right.

Mr. AXTELL. He says there is no tuberculosis now.

Q. Is the treatment of a patient who is injured, after an injury to the lungs or the diaphragm or the pleura or other parts of the tissues about the lungs—is rest important in such cases? A. Is treatment following such an injury of importance? It is.

Q. I say rest. A. Why, certainly.

306 Q. And requiring violent exercise or substantially violent exercise, such as kneading bread, would not be good treatment for a man who had received such an injury, would it? A. I do not

think anybody would pick that out particularly as a form of treatment for anybody who had an injury.

Mr. AXTELL. That is all.

Redirect examination by Mr. LANDIS:

Q. Doctor, assuming that the plaintiff was struck by a wave and knocked unconscious and blood came from his mouth and nose in consequence of being knocked unconscious, or suppose that the man were ill, the illness being a vague illness, nobody knowing quite what it was, and that man were made to work for a period of two hours kneading bread, several days after this accident occurred or this illness first became known, would that cause tuberculosis, that kneading of bread, that working for two hours—would that be a cause of tuberculosis? A. It would not be a cause of tuberculosis.

Q. That is your definite opinion, that it would not cause—A. (Interposing.) It would not cause tuberculosis. You might make your question specific.

Recross-examination by Mr. AXTELL:

Q. It might lead to a sufficient deduction of resistance of the patient so that tuberculosis might develop, might it not? A. It might contribute.

Q. Yes; might aggravate it. You made X rays, I suppose, of this man? A. Yes, sir.

Q. Have you got them with you, Doctor? A. Yes, sir.

307 Q. You say they do not show tuberculosis on the date of April 7th? A. In my opinion they do not.

Q. Other doctors might have a different opinion from the same X rays? A. It depends entirely on the degree of experience, I think, of the doctor reading the X-ray plates.

Q. And it depends somewhat upon this history of the case and the slant that you get on it, does it not? A. We always take that into consideration in determining X-ray plates.

Q. You got a history in this case, I suppose, did you not? A. Yes, sir.

Q. You saw the history of the marine hospital? A. Yes, sir.

Q. This young Dr. Mac—something or other—McPeak? A. Yes.

Q. Who was of the opinion that this boy was a malingerer? A. I do not think I ever saw that.

Q. Oh, you did not see it? A. I do not remember it. I do not recall it.

Q. You were told that, were you not? A. I do not recall anybody said that, Mr. Axtell.

Q. It never occurred to you that he was a malingerer, did it? A. I don't know whether that occurred to me or not. What I had to work out was my——

Q. (Interposing.) That is all right.

The COURT. Doctor, you say that working for two hours might be the cause of tuberculosis. Do you say that any physician could say

with reasonable certain that it was the cause of tuberculosis, when after the man had spent a reasonable time in a hospital abroad and had returned to this country and was examined by physicians
308 and was found not only by you but by all others to have no symptoms or indications, either on X-ray or fluoroscopic examinations, that he was then suffering from tuberculosis—assuming those facts, would you say that any doctor would be justified in thereafter finding what he believed to be a condition of tuberculosis, that that working for two hours on board the ship was a competent producing cause of that tubercular condition?

Mr. AXTELL. May I interpose an objection, most respectfully, to your honor's question, on the ground that it is qualifying by one witness the testimony of another witness, and hearsay, and immaterial and irrelevant, on that ground.

The COURT. Well, I will ask you first, could you say with your knowledge of medical science, with reasonable certainty, that the working for two hours on board the ship was the cause of that tubercular condition?

The WITNESS. I could not.

The COURT. In your opinion would any other physician, skilled in medical science, make that statement with reasonable certainty? A. I do not see that he could.

The WITNESS. I do not see that he could.

The COURT. You may have your exception to the questions.

Recross-examination by Mr. AXTELL:

Q. Doctor, if there was some loss of blood due to the exertion of kneading bread, causing what was described by the witness as a hemorrhage, would that affect the case any? A. I can not
309 answer that in a generalized question like that. We have to take into consideration the amount of blood that was lost and the effect that it had on the particular patient at the time. A small amount of blood I should not think would have very much effect on him.

Q. Doctor, it would indicate that some kind of a lesion occurred, would it not? A. It would indicate the blood was getting into his sputum somewhere, certainly.

Q. It would indicate some kind of a lesion? A. A lesion somewheres in his mouth, nose or windpipe or lungs.

Q. And the loss of blood, if it continued afterwards, would tend to weaken the patient, would it not? A. That depends entirely upon the amount of blood. Yes, I think it would contribute to it.

Q. If the first hemorrhage occurred when he was working, doing this work which he was doing under compulsion, and hemorrhages continued thereafter, you would attribute——

The COURT. Until when?

Mr. AXTELL. Well, up to quite recently.

Q. You would attribute the hemorrhages to the compulsory work, would you not?

The COURT. There is no contention, Mr. Axtell, that this man was suffering from tuberculosis at the time your doctor first examined him, is there?

Mr. AXTELL. No.

The COURT. Then please put that statement in it.

Mr. AXTELL. I do not know why the court should——

310 The COURT. You may take your exception.

Mr. AXTELL [continuing]: Look after the defendants' interests.

The COURT. Proceed to your next question.

Mr. AXTELL. I certainly do take it.

The COURT. I think it is for the court to protect both interests.

Mr. AXTELL. I do not think this witness or this defendant needs any assistance except that of counsel.

The COURT. Next question.

Q. You did say, doctor, that the disease of tuberculosis develops as the result of a lowered resistance of the patient. Does it not? A. It develops sometimes as a result of lowered resistance. I think in order to make that point clear I might go a little further and say something about the way tuberculosis develops in the adult.

The COURT. You may do that.

The WITNESS. And manifests itself. It is commonly accepted by people working in tuberculosis that tuberculosis is taken in in very tiny doses, usually during the first seven to ten years of life. That is the way people gradually build up immunity against the disease later in life and maintain their health.

Q. An injury to one person—well, say the same injury to two different persons, may result in one instance in tuberculosis and in the other nothing; isn't that true? A. It might light up a latent tuberculosis in one person and not in another.

311 Q. If a person merely has the germs in his system, is that latent tuberculosis? A. We call a latent tuberculosis a tuberculosis that is present in the system without manifest symptoms. That is the kind of people we were talking about before, on post mortem showing they died of other conditions.

Mr. LANDIS. I do not believe these men can hear you back here.

The WITNESS. By latent tuberculosis we mean tuberculosis in the system that does not show any symptoms and is sealed up.

Q. I think I am a fairly healthy specimen. It is possible that I might have them? A. There are some of the glands on the roots of your lungs. Very possible.

Q. An injury to my lungs or a blow in a boxing bout, or something, probably would not start up a tuberculosis would it? A. I should not think so.

Q. But if you take a thin, anaemic undernourished person, could the same blow with the same symptoms in his system start up tuberculosis? A. It might light up tuberculosis; that is possible.

Q. Would you say in both instances both persons were suffering from a latent condition of tuberculosis before the blow was struck?

A. Well, we call a latent tuberculosis also; further than that, a tuberculosis in which although no symptoms are developed there are usually some X-ray evidences, according to Opi, of small healed lesions. Opi is one of the best men we have in the country on immunology.

Q. Is it a common accepted theory that tuberculosis develops where the resistance of the patient is lowered? A. In that part of the body where the resistance is lowered?

312 Q. Yes. A. Yes, I think so.

Q. That is fundamental; you do not have to think about that, do you, doctor?

The COURT. Mr. Axtell, proceed, please, without comment.

A. No, I have to think of it.

Q. Was it because you wanted to see the effect of your answer, or because you hesitate about knowing what the answer was. A. Because I wanted to tell you exactly the truth.

Q. Wasn't it because you wanted to be sure what the effect of your answer would be? A. It had nothing to do with it.

Q. You were looking for the next question. A. I was not.

Q. All right. Lowered resistance of a patient does encourage the disease of tuberculosis, whether that resistance is lowered in a locality or generally, doesn't it? A. Yes.

The COURT. Does that assume, doctor, that the man already has it?

The WITNESS. That the man has a tuberculosis, a latent tuberculosis in his system. It may contribute to the lighting up of the disease, your honor.

The COURT. Then if he stays up late at night, that also would do it?

The WITNESS. That could do it, too.

The COURT. It would tend to aggravate the condition?

The WITNESS. Yes, sir.

Q. Does the loss of blood lower the resistance? A. I just said it did.

313 Q. And might in a man who has sustained a severe strain, the exertion of kneading bread, be a competent producing cause of creating a lesion in the lungs that would produce a loss of blood? A. I said that it might contribute to it.

Q. Yes or no. A. Yes.

Q. It might be the cause of the lesion that would produce the hemorrhage, might it not? A. It might contribute to it.

Redirect examination by Mr. LANDIS:

Q. Doctor, did Mr. Lustgarten tell you how often he had been spitting up blood? A. Yes, sir.

Q. What is your conclusion from his statement? A. I am unable to find objective findings which would lead me to believe that his spitting up all this large amount of blood—I mean I am unable to find objective findings commensurate with subjective symptoms, if that is clear.

(Witness excused.)

Mr. LANDIS. If your honor please, I renew my motions to dismiss the second cause of action on the ground that the plaintiff has not succeeded in making out the second cause of action.

The COURT. I will deny that motion.

Mr. LANDIS. Exception. If your honor please, I move that the second cause of action be stricken out because it has not been established by the plaintiff that either of the defendants in this action is connected with the steamship on which this plaintiff was employed except as agents.

The COURT. Motion denied.

314 Mr. LANDIS. Exception. Now, if your honor please, I move that the court to direct the jury to return a verdict for defendants in this case.

The COURT. Motion denied.

Mr. LANDIS. Exception.

Mr. Landis summed up to the jury on behalf of the defendants.

Mr. Axtell summed up to the jury on behalf of the plaintiff.

Charge to jury

The COURT (Thacher, J.): Gentlemen of the jury, you are performing a very important function and you have a delicate duty to perform, one of great importance and one which can not be delegated. You men are not to be governed by your feelings or by your emotions. It is my duty in this case and in every case to caution the members of the jury against the appeals which are made to their sympathies by counsel for plaintiffs. Perhaps through defects in the law itself it is the law that as jurymen you should follow your oath and not decide cases on grounds of sympathy.

This case is one which appeals deeply to the sympathy of every man who is brought into contact with the life of this plaintiff. Nevertheless it has been my duty to restrict your consideration of the issues here because the law says I must, as I understand the law. I should much prefer, as each one of you, to say to you gentlemen this is a poor man, he leaves this room a wreck unless you and I provide for him. That is an emotional appeal. It is my duty to restrict your consideration to those questions which the law, as it is established, provides as a basis of possible liability in this case.

315 Consider for a moment the effect of your disregard of that duty, which is squarely imposed upon you as it is upon me. The case has been tried. I have ruled as a matter of law that the ship, so far as the occurrence of the accident was concerned, was not at fault and is not liable. The plaintiff has his exception taken to that ruling. He may review that ruling of law and it may be taken to a higher court and the ruling reversed. Personally, I should be glad to see it taken there. If you gentlemen in your consideration should undertake after that ruling has been made to allow a recovery of damages on any such theory, though the plaintiff may appeal the question of law and reverse the judge and have another

recovery, you have already in your consideration allowed something to which he was not entitled.

So you come when you analyze the situation to see that it is your duty in fairness to him to decide this question upon the theory upon which I feel, rightly or wrongly, it must be submitted to you. For if you do not, you deprive the defendant of the right which he has to have those questions reviewed in a higher court; whereas upon those questions which are submitted to you for your decision as questions of fact, you gentlemen are the final judges, your decision will never be reviewed in any court, and if you undertake to decide questions which are not within your province there will never be a review by the defendant of your decision and no court can dispute it.

So, if we are here in the interest of justice, you gentlemen must take this case as the court submits it to you, whatever you may think of the law as I state it. And that brings us to the only ques-
316 tion in the case. Where a seaman is employed upon a ship the law has always imposed upon the ship and her owners—in this case the suit is against the owners or those who were operating the ship—the duty of taking care of the man when he is sick or when he is injured. If he falls sick or has an accident, there is that affirmative duty. It can not be delegated from one man on board the vessel to another. The defense has suggested that to support recovery by the plaintiff the captain must have known of this man's condition if you find that he ordered him out on deck. But if any other responsible officer knew of it, that knowledge would be equally binding as the captain's own personal knowledge.

There was a duty of the man to report his condition to his superiors. But once that report was made, whatever superior ordered him, contrary to what was the care that he was entitled to, to go to work, whether that superior happened to know what he told the second officer would not make any difference. As soon as he reported the fact that he was sick, then the obligation arose and continued to care for that man in his illness.

That is the only question. He says that he was cruelly and brutally ordered to work over his own protest, when he was unable and unfit to work. He says, furthermore, that when he was at work, I think it was the second officer Abbott came to him in the galley and expressed surprise, and said, "Why, Lustgarten, what are you doing here, you ought to be in bed." And Lustgarten told him that the captain had ordered him to work, and Abbott said, "Well, come up on the bridge and see the captain." That then they went to the bridge and the captain said he did not care how sick he was,
317 this man had to go to work. If you believe that story, gentlemen, that is the most outrageous, brutal, cruel violation of the duty which was upon the ship and its officers in that situation that could be well conceived of.

On the other side of that issue, you saw the second officer Abbott; you judged him as a man. He is apparently disinterested. You heard the deposition of the captain. The stories are absolutely ir-

reconcilible. One is a picture of consideration and full performance of the duty which was imposed; the other is a brutal, inhuman disregard of that duty. It is your function as gentlemen of the jury, as the sole judges of the facts, to determine where the truth lies between those two stories.

If you find there was no breach of that duty to properly care for that man after he was injured, it will be your duty under your oaths to find a verdict for the defendant. Whatever you may think about anything else in the case, that is the only road you can follow. The first question is whether that duty was neglected or was performed. If not neglected, you must find for the defendant. Assuming your finding is the other way, then the question is what effect did that amount of work—two hours, I think the plaintiff said—in the galley have upon this man.

It is claimed by the plaintiff that it was the cause of his consumption, which he claims he suffers from at this time, and that rests solely upon the testimony of the physician called by the plaintiff who said that in his opinion he could state with reasonable certainty on the facts which were assumed in the question that the plaintiff's work for two hours on board that ship on that particular day was the cause of the tuberculosis from which he says he suffers.

318 In passing I might explain to you that the other doctor called by the plaintiff testified, as you will recall, that that period of work could have had nothing to do with the man's sight, and it was upon that statement that I told you at the time that the condition of his eyes would necessarily be excluded from your consideration. Had the plaintiff established the fault or a basis for your finding of fault with regard to the accident itself, it would have been my duty to submit to you the question whether the condition of his eyes had resulted from the accident. But the doctor having told you that it could not have resulted from the order to go to work, then that was necessarily removed from the case. So that you must give no consideration whatsoever to his sight.

Dr. Powers said that he could state with reasonable certainty that the two hours' work resulted in tuberculosis. The testimony of every expert witness may be given as much or as little weight as the jury thinks it is entitled to receive, and you must judge that conclusion of Dr. Powers as rational and reasonable men, aided with his knowledge and the knowledge of the other doctor in regard to the disease of tuberculosis, and reach a rational conclusion as to whether you can say or you believe the doctor with reasonable certainty could have said—but it is your final say—whether you can say and are satisfied that those two hours of work resulted in this man contracting or having tuberculosis.

Dr. Powers frankly admits that when the man was first examined he had no evidence whatsoever of suffering from tuberculosis. There was nothing on the X-ray plates, there was nothing in the fluoroscopic examination, there was nothing in his examination of

319 the man's body or sputum which suggested that at that time several weeks or months, you will recall the period, after

e accident, that the man had any signs of tuberculosis. Notithstanding his positive assertion to that effect, he tells you at by reason of what was described as happening at the time of e accident he can state and does state that in his opinion the stayg at work was the cause of the man's contracting tuberculosis. ou are to judge his conclusion rationally, accept it or reject it, as u determine is right.

Your verdict must not be based in any event upon guesswork or eculation. There were many questions asked of both doctors as what might or might not result from this or that. Such testiony is no proper basis for any finding of fact upon your part. It necessary in order to justify a judgment against one man in favor another that the facts upon which it is based are established by preponderance of the evidence, and to your satisfaction as rational man beings and thinking men. And you must not base your findg upon guesswork or speculation.

Gentlemen of the jury, the burden is upon the plaintiff to satisfy u that he is entitled to recover on the principles I have stated you, by a fair preponderance of the evidence. You are to judge e evidence as you judge people, as you meet them from day to y, as they tell you this and that. We are sometimes mistaken, but ost often right in our judgment of the men we meet. Take the pearance of the men on the stand and decide on your own impresons whether they are telling the truth, and decide this case on the idence and in accordance with your oaths as jurors, so that justice ay be done.

Are there any exceptions?

0 Mr. AXTELL. The plaintiff excepts as follows: Excepts to the comments of the court as to evidence, the characterization evidence, relating to and giving undue weight to certain parts of e evidence, by mentioning it specifically, and by failure to mention her evidence particularly which results in giving, as I recall it, an tirely different version of plaintiff's claim than that which was ade.

The COURT. Mr. Axtell, you may indicate your exceptions. I do t wish you to argue the case at this time.

Mr. AXTELL. That is what I am trying to do.

The COURT. You may refer to those portions.

Mr AXTELL. I except to your suggestion. I except to that part the charge where your honor referred to the occurrence on the idge.

The COURT. I will allow you an exception to the charge as a whole.

Mr. AXTELL. On the ground that it is unfair and biased.

The COURT. On any ground that you wish to state.

Mr. AXTELL. All right. I ask your honor to charge the jury they e the sole judges of the facts in this case.

The COURT. I have so charged the jury.

Mr. AXTELL. I ask you to charge the jury that the court has no terest whatsoever in the determination of the result of this case,

and that they will not incur the court's displeasure if they find a verdict plainly contrary to the court's expressed opinion of the facts.

The COURT. That is quite absurd, gentlemen, to imagine anything else. I have no interest in the case, and you have none. You may retire.

321 Mr. LANDIS. If your honor please, may I ask for one instruction. Will your honor charge that if the jury find that the plaintiff has not pulmonary tuberculosis, then they must find a verdict for the defendant.

The COURT. I refuse to so charge, because, gentlemen, even if you find that he had not pulmonary tuberculosis, the mere suffering of the man during the time that he was at work, if that was caused by a wrongful order and disregard of the duty imposed upon the ship—that in itself might be the basis for an award of damages to compensate him for that suffering, and for any other suffering that you gentlemen upon all the facts and circumstances in this case find he may have had or damage that he may have incurred as the result of the wrongful order, if you find the wrongful order was given.

Mr. LANDIS. May I except to your honor's refusal to charge.

The COURT. You may.

Mr. LANDIS. And may I except to that part of your charge which states that the jury has a right to return a verdict for any suffering that the plaintiff might have had as the consequence of doing what he did in those two hours.

Mr. AXTELL. If your honor please, I ask your honor to charge the jury that if their recollection of the facts is that Dr. Power examined him on the 6th of April, 1926, some thirty days after his injury, and that at that time he found no positive evidence of tuberculosis, that is not, in view of the explanation of the experts as to the development of the disease, to be taken as an inference that he did not or had not incurred an injury that later resulted in it.

322 The COURT. Gentlemen, from all of the facts and from all of the testimony it is for your recollection and determination. You take the whole case. We would be here all day if we were to suggest this, that and the other thing. Your recollection is controlling. You are the sole judges. You must not guess or speculate how I would find or be governed by that, because it is solely your responsibility.

JUROR No. 12. I would like to hear that part of the testimony where he said he only had to work two hours.

The COURT. I will ask the jurors to retire and commence their deliberations. If in those deliberations it is necessary to have any of the testimony read, your foreman will indicate and you will be brought back to the court. Your recollection may be refreshed by the others.

(The jury then retired at 12.12 o'clock p. m.)

RECESS

(At 2.35 p. m. the jury returned.)

The CLERK. Mr. Foreman, have you agreed upon a verdict?

The FOREMAN. We have.

The CLERK. How say you?

The FOREMAN. We find for the plaintiff for the sum of $10,000.

The CLERK. Gentlemen of the jury, listen to your verdict as it stands recorded: You say you find a verdict for the plaintiff for $10,000, and so say you all?

The FOREMAN. Yes.

Mr. LANDIS. If your honor please, I move that the verdict be set aside as contrary to law and contrary to the evidence and contrary to the weight of the evidence, and on all the other grounds set
323 forth in the appropriate section of the civil practice act except on the ground that the verdict is insufficient; and on the further ground that the verdict is excessive.

The COURT. Motion denied.

Mr. LANDIS. May I have an exception?

The COURT. Yes.

324 In United States District Court

[Title omitted.]

Stipulation settling bill of exceptions

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing is a true bill of exceptions, containing all the evidence introduced at the trial of this action, all the objections, and exceptions made during the trial of this action and that the *the* same may be settled and allowed, signed and certified, and made a part of the record in this case.

Dated, New York, October 26th, 1927.

SILAS B. AXTELL,
Attorney for Plaintiff.
CHARLES H. TUTTLE,
United States Attorney.
EDGAR G. WANDLESS,
Attorneys for Defendants.

325 In United States District Court

[Title omitted.]

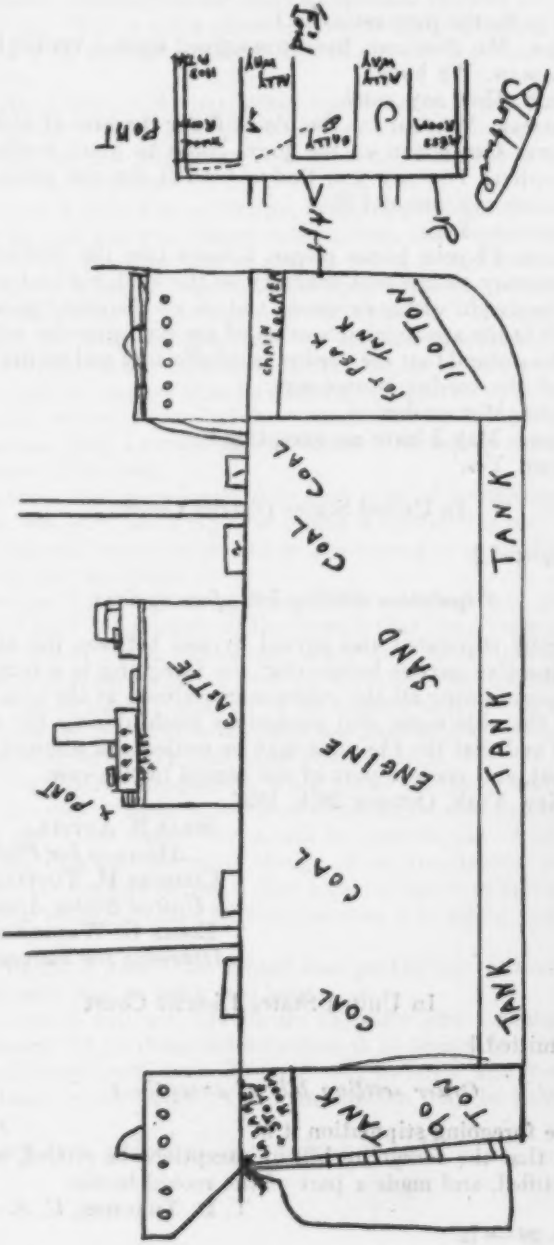
Order settling bill of exceptions

Upon the foregoing stipulation it is

Ordered that the foregoing bill of exceptions be settled, allowed, signed, certified, and made a part of the record herein.

T. D. THACHER, *U. S. D. J.*

326 *Plaintiff's Exhibit 1*



176—1





176—2

320 *Plaintiff's Exhibit 4*

"Operating Agreement, 1924" 17459—24

United States Shipping Board, represented by Emergency Fleet Corporation United States Shipping Board, Washington

AGENCY AGREEMENT FOR MANAGING AND OPERATING VESSELS

This agreement made in duplicate the 1st day of May, 1924, between the United States of America, hereinafter designated as the owner, acting through the United States Shipping Board, represented by the United States Shipping Board Emergency Fleet Corporation, and Consolidated Navigation Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, hereinafter called the agent, witnesseth:

1. Appointment of agent.—The owner appoints the agent as its agent to manage, operate, and conduct the business of such vessel as it has assigned or may assign to the agent under the supervision of the owner at all times.

2. Agent's acceptance of appointment.—The agent agrees to act as such agent and to manage, operate, and conduct the business of such vessels in accordance with the directions, orders, and regulations which the owner may from time to time prescribe.

330 3. Manning, equipping, etc., vessels and paying disbursements.—The agent agrees to man, equip, victual, and supply such vessels, subject to such restrictions and in such manner as the owner may prescribe, and to pay for account of the owner the cost thereof and all other costs and expenses incident to the management, operation, and conduct of business of such vessel as the agent may from time to time be directed by the owner.

4. Maintenance and repairs.—The agent shall, subject to such regulation or methods of supervision and inspection as may be required by the owner, exercise reasonable care to maintain the vessel in a thoroughly efficient state in hull, machinery, tackle, apparel, furniture, and equipment, procuring the necessary labor and material to effect ordinary running repairs and replacements. No extraordinary repairs or expenses of any kind shall be made or incurred and no alterations in hull, machinery, or equipment shall be made by the agent, except in cases of serious emergency, without first securing in writing the authorization of the owner. All such expenses properly incurred in connection herewith shall be for the account of the owner.

5. Agent must use care to avoid all damage and loss.—The agent agrees to exercise reasonable care to protect and safeguard the interests of the owner in all respects, and to exercise reasonable care to avoid loss and damage of every nature to the owner.

6. Trades, bills of lading, etc.—The agent shall be subject to the orders of the owners and its authorized representatives as to voyage, charters, rates of freight, and other charges and as to
331 all other matters connected with the agency aforesaid, and shall cause to be issued to shippers customary charter parties, contracts of affreightment, and bills of lading. All such bills of lading shall be in the form now adopted and approved or in the form which may hereafter be adopted and approved by the owner.

7. Subagents.—The selection by the agent of agents or subagents shall be subject to disapproval by the owner. The agent shall be responsible to the owner in all respects for the acts of any subagent selected by him, and such subagents shall not be in any respect the agents of the owner but solely the agents of the said agent.

8. Collection of money.—The agent agrees to collect when due all freight and other moneys accruing to the owner arising out of the management, operation, and business of the vessels, and, in the event of the failure of any charterer, shipper, or other debtor of the owner, to pay promptly such moneys, to immediately notify the proper officer of the owner, and in the meanwhile take such steps as may be proper to protect the owner's interests. The agent further agrees to do all things which the owner is required by law or custom to do either as owner of the vessels or as carrier of the cargo. All credit granted by the agent, without the express approval of the owner, will be at the agent's risk.

9. Handling of moneys.—The agent agrees to deposit all moneys collected on behalf of the owner in a national bank or bank which is a member of the United States Federal Reserve Associa-
332 tion or such other bank as may be approved by the owner as a separate fund in the name of the United States Shipping Board Emergency Fleet Corporation, which money shall, in so far as the agent is concerned, be the property of the owner, and drawn upon only as directed by the owner; and whenever the treasurer of the Fleet Corporation considers the public interest demands they shall be subject to check by him as well as by the agent. The agent shall, at such times and in such form as may be directed by the owners, render a full account of all moneys received and disbursed. Only items supported by proper vouchers or accountings will be allowed in settlement with the agent.

10. Accounting and auditing.—The agent shall keep separate books of account in such manner and form as may be prescribed or approved by the owner, devoted exclusively to the agency business with the owner, which books, together with all vouchers, accounts, papers, or other documents, shall at all times be subject to the inspection and audit of the owner; and the owner may at any time temporarily take possession of the same to make a complete audit; and, in case the agency is terminated, may retain possession of such books and papers as it may deem advisable. The agent shall furnish statements and reports when called for by the owner, and in the form prescribed by

the owner, and shall generally conform its accounting to the directions of the owner.

11. Compensation.—The owner shall pay to the agent as full compensation for the agent's services the commissions and fees specified hereunder as follows:

333 (a) From United States and Canadian ports.—Seven and one-half per cent on gross outward ocean freight, dead freight, demurrage, express, and mail revenue earned by the vessel; Provided, That 3¾ per cent only shall be paid on coal, sulphur, phosphate, and grain in bulk, in case any one of these commodities constitutes more than 60 per cent of the payable tons of the vessels, total outward cargo, regardless of the number of ports of loading or discharge, and regardless of the number of bills of lading, or consignees; And provided further, that 3¾ per cent only shall be paid on full cargoes of other commodities shipped by one shipper to one consignee, from one port of loading to one port of discharge, to be accepted and delivered by the ship without count or marks.

(b) Into United States and Canadian ports.—Three per cent on gross inward ocean freight, dead freight, demurrage, express, and mail revenues earned by the vessel.

(c) Between other than United States and Canadian ports.—Three and three-fourths per cent on gross ocean freight, dead freight, demurrage, express, and mail revenue earned by the vessel.

(d) Passenger revenue.—Seven and one-half per cent shall be paid on gross passenger and excess-baggage revenue derived from carrying passengers on cargo vessels.

(e) Salvage.—Five per cent of all salvage earned for account of the vessel after deducting crew's proportion for salvage services rendered to vessels not owner or controlled by the owner, and 2½ per cent on all salvage earned for account of the vessel after 334 deducting crew's proportion for salvage services rendered to vessels of the owner. The amount of salvage awards for such last-named services shall be determined by the owner, and all negotiations for settlements of other salvage claims shall be in the control of the owner.

(f) The commissions provided for above upon dead freight, demurrage, and salvage shall be paid only on revenue actually collected. Final control over the compromise, settlement, or waiver of disputed claims for dead freight, demurrage, salvage, etc., shall be with the owner.

In consideration of the compensation provided above, the agent hereby agrees that he will assume and pay for his own account the costs and expenses enumerated hereunder:

(a) Costs of furnishing and preparing all cargo and shipping documents, including labels, tags, etc.

(b) All administrative and general expenses of every nature, including traveling expenses of his employees, and including telephones, telegrams, cables, postage, and petties.

(c) All agency fees and commissions payable to subagents of the agent in United States and Canadian ports.

12. Brokerage.—Freight, passenger, and charter brokerage, in cases where it is necessary and properly incurred to secure cargoes, passengers, or charters in accordance with the custom of the trade, shall be for account of the owner, whose decision shall be final.

12a. Commissions and fees.—The owner shall assume and pay, except as is otherwise provided herein, the customary fees and
336 commissions for agency services rendered at foreign ports, such fees and commissions to be subject to the approval of the owner.

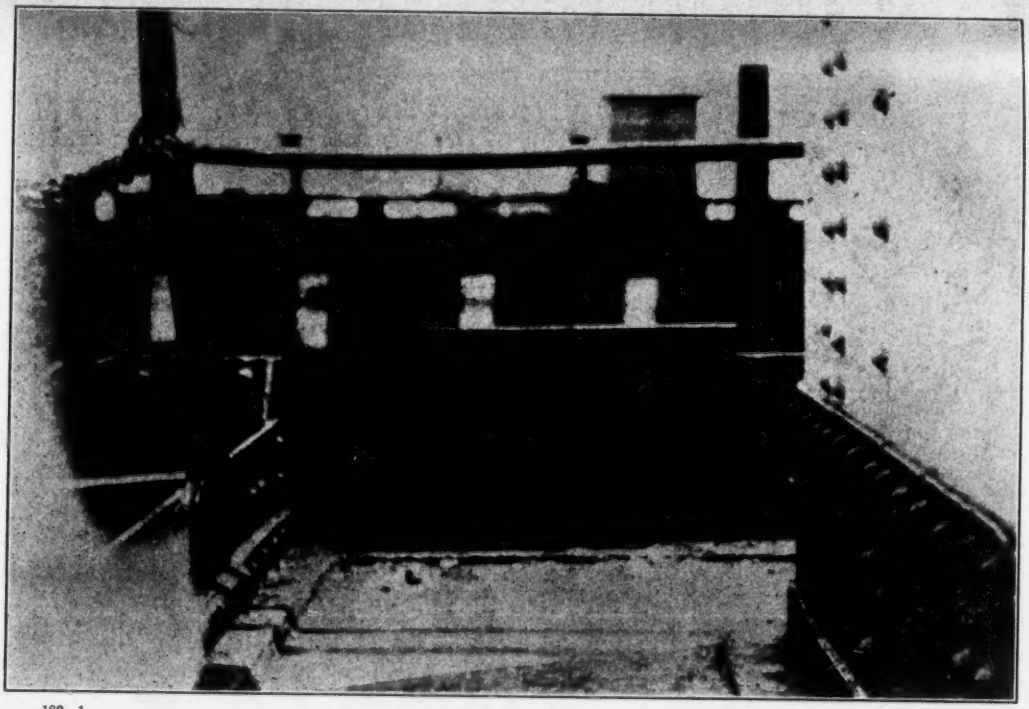
13. Use of each other's contracts by the owner and agent.—The owner shall, when it may legally do so, have the advantage of any existing, or future, contracts of the agent for the purchase of materials, fuel, supplies, or equipment, provided this may be done without unreasonably interfering with the requirements of other vessels owned or operated by the agent. In every case where the owner shall contract or shall have contracted for materials, fuel, supplies, equipment, or services, such as those of the United States Salvage Association, or other similar services, the agent shall procure the same in pursuance of such contract and shall pay for the same in accordance with the directions of the owner: *Provided*, That when necessary to avoid undue delay to vessels, the agent may, subject to the owner's approval first obtained, procure materials, fuel, supplies, equipment, or services from other sources at lowest obtainable costs. The agent in such cases shall support its disbursements with satisfactory explanation to the owner.

14. General average.—In case of general average, the agent agrees to appoint an adjuster, approved by the owner, and to assist the adjuster in preparing the average account, to take proper security for the cargo's proportion of average, and to assert liens and to take all other possible measures to protect the interests of the owner. For such services the agent shall receive the customary fee, the
336 amount of which will be determined jointly by the agent and the adjuster, subject to the approval of the owner.

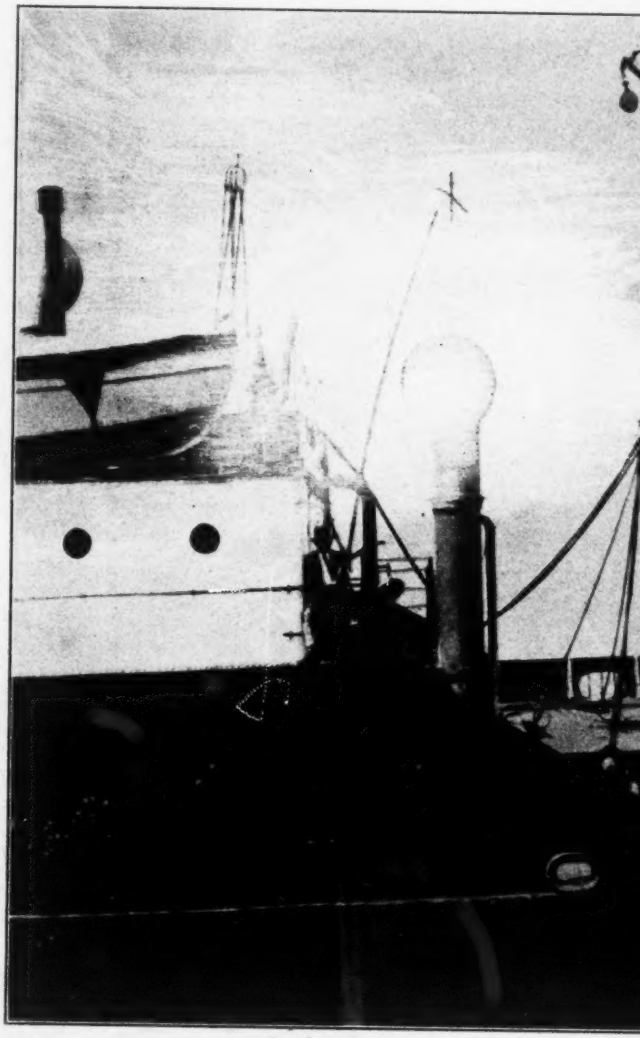
15. Bond.—The agent agrees, whenever required by the owner, to furnish a bond satisfactory to the owner for the faithful performance of the agent's duties and obligations hereunder.

16. Termination of agency.—(a) The owner shall have the right at any time to terminate this agreement as to any and all vessels assigned to the agent and to assume control forthwith of any or all of said vessels, and to collect directly all freight moneys or other debts remaining unpaid.

(b) Upon giving the owner 30 days' written notice, the agent shall have the right to terminate this agreement, such termination not to become effective as to any vessel until its arrival and discharge at a United States port.



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160—2

In case of termination under either (a) or (b), the agent, shall, if required by the owner, adjust, settle, and liquidate the current business of the vessels.

17. Trade name.—The trade name under which a line or route is operated with vessels of the owner shall be subject to the approval of the owner, and shall not contain the name of the agent, and such trade name shall remain the property of the owner.

18. Certain profits prohibited.—It is understood and agreed that any agent receiving directly or indirectly any profit or benefit from any services rendered or supplies furnished to vessels of the owner operated by the agent shall account for and pay such profits
337 to the owner. The agent as representative of the owner is not permitted to trade with any individual, firm, or corporation, where he may have an interest except first with the written approval of the owner.

19. Foreign flag vessels.—Except with the specific approval of the owner, the agent shall not be permitted to operate either as agent, owner, or charterer foreign flag vessels competing with lines operated by or for the United States Shipping Board.

20. Readjustment of commission.—If at any time during the continuance of this agreement the compensation to the agent, by reason of changed conditions or for any other cause, should appear to the board to be unjust either to the owner or to the agent, it shall be subject to readjustment after consultation between the parties, and the decision shall be final.

21. Interpretation of agreement.—Any question arising under this agreement shall be referred to the United States Shipping Board for determination, and its decision shall be final.

In witness whereof the parties hereto have executed this contract in duplicate the day and year first above written.

UNITED STATES OF AMERICA,
By UNITED STATES SHIPPING BOARD
By UNITED STATES SHIPPING BOARD,
EMERGENCY FLEET CORPORATION.

By (sgd.) L. C. PALMER, *President.*

338 Attest:
(Sgd.) CARL P. KREMER,
Secretary.

CONSOLIDATED NAVIGATION COMPANY,

By (sgd.) L. C. PALMER, *President.*

Attest:
(Sgd.) W. D. PRITCHARD, *Secretary.*

Approved as to form:
(Sgd.) STEPHEN BARKER,
Assistant to General Counsel.

341 *Exhibit A*

AFFIDAVIT OF BENJAMIN LUSTGARTEN

PORTUGAL, AZORES ISLANDS, ISLAND OF ST. MICHAEL, CONSULATE OF THE UNITED STATES OF AMERICA, *ss.:*

Before me the undersigned, William F. Doty, consul of the United States of America, appeared Benjamin Lustgarten, well known to me and being duly sworn deposed and said:

I was an A. B. seaman on board the United States Shipping Board S/S "Coelleda," of which William H. Lee was master, and when at sea about one day and a half from Swansea on the voyage toward New York I was on duty. I was going to dump a can of ashes. There was a very heavy sea running but there was no lee side because the wind and sea were right ahead. The ship had a very bad leak and the after peak tank could not be emptied because the pipe line was full of lines and dirt. They took a pump out of the engine room and set it on deck, but the water was coming in just as fast as they were pumping it out, and with water in the after peak and storeroom the ship's stern was way under the water, which made the ship like a log on the water. The ship could not be steered; she was always drifting 20 to 40 degrees off her course. I was going to dump the ashes, when all of a sudden the ship came over with a heavy list to port, bringing with it a heavy green sea which landed right on my back pressing my chest up against the rail knocking me unconscious. Mr. Graft picked me up and brought me into the hospital where he said I was unconscious for three hours. When I came to myself the captain was standing there and he said, "Come on now, get up and go to work." I was still dazed by the blow
342 but fell down when I stood up. I lay in bed two days, then the captain came once more and said, "You will have to go to work because I am short handed," so I said to him, "Captain, you are doing this at your own risk because I am too weak to go to work." But he said, "That's enough out of you, young man." That day I had my first attack of overflow blood coming out of nose and mouth and on the 8th day of March I had five straight attacks in which I think I lost two pints of blood. The captain said I had the tuberculosis but I told him he was wrong. The only thing they had in the medicine chest was Epsom salts and not very much of that. The ship just having come out of the lay-up fleet was not prepared to cross the North Atlantic in March which any skipper that has had any experience at all will tell you. The captain kept on saying, give him another dose of salts, but Mr. Abbott, 2nd officer, said, captain, you will kill him if you keep giving him Epsom salts. The captain said, "That is what I want to do." Thereafter the captain would not have anything to do about treating me. Every day after that I had from one to five attacks, leaving me very weak. The following five men saw me get hit by the wave: Mr. Graft, A. B. seaman; Mr. Mullen,

water tender; the boatswain; the chief cook; J. Burns, A. B. seaman; and R. Abbott, 2nd officer.

BENJAMIN LUSTGARTEN.

Sworn and subscribed before me this 22nd day of March, 1926.
Witness my hand and seal of office at St. Michael's, Azores.
Service no. 297.
No fee prescribed.

W. F. DOTY,
Consulate of the United States of America.

343 In United States District Court,

[Title omitted.]

Stipulation as to exhibits

It is stipulated and agreed by and between the attorneys for the respective parties hereto that all the exhibits introduced at the trial of this action by the parties herein shall be reproduced in the printed record on appeal except defendants' Exhibits B & C, which need not be reproduced but which may be used on the argument of the appeal by any of the parties.

Dated, New York, N. Y., October 4, 1927.

SILAS B. AXTELL,
Attorney for Plaintiff.

CHARLES H. TUTTLE,
Attorney for Defendant, U. S. S. B. E. F. C.

IRVING L. EVANS,
Attorney for Defendant,
Consolidated Navigation Co., Inc.

344 In United States District Court,

[Title omitted.]

Petition for writ of error

And now comes the defendants herein, United States Shipping Board Emergency Fleet Corporation, by Charles H. Tuttle, United States attorney and the Consolidated Navigation Company, Inc., by Edgar G. Wandless, its attorney, and feeling themselves aggrieved by the final judgment of this court entered against them and in favor of the plaintiff on the 22d day of July, 1927, defendants hereby pray that a writ of error be allowed to them from the United States Circuit Court of Appeals for the Second Circuit to the District Court of the United States for the Southern District of New York,

and in Connection with this petition, petitioner hereby presents its assignments of error.

Dated, New York, N. Y., October 5th, 1927.

CHARLES H. TUTTLE,
United States Attorney,
Attorney for Defendant, United States Shipping Board Emergency Fleet Corporation.

EDGAR G. WANDLESS,
Attorney for Defendant,
Consolidated Navigation Company.

Office & Post Office Address, 45 Broadway, Borough of Manhattan. City of New York.

345 In United States District Court

[Title omitted.]

Assignments of error

The defendants above named, by their attorneys, Charles H. Tuttle, United States attorney, and Edgar G. Wandless, assign error in the final judgment entered in this case July 22, 1927, in that the learned trial judge erred as follows:

First. In denying defendants' motion to dismiss the second cause of action alleged in the complaint at the time that the court first called for motions just prior to the end of the plaintiff's case and in denying defendants' motion to dismiss the second cause of action contained in the complaint at the end of plaintiff's case as follows:

"Mr. LANDIS. If your honor please, I move to dismiss the complaint in both causes of action as against both defendants * * *.

346 With regard to the second cause of action that on the plaintiff's own admission he was not made to work after the captain realized how ill he was. That he was given the best medical attention according to his own statement and was paid off the ship at Ponta del Garda to enter the hospital.

* * * * * * *

"Mr. LANDIS. If your honor pleases, may I renew my motion on the second cause of action, on the ground that there is no proof in this case that the captain had any reason to believe that man was in a serious condition when he suggested that he go to work; and the captain only when he had reason or sufficient reason to know the man was actually ill and suffering excused him. As soon as the captain had an opportunity to find out from the man in charge of that duty aboard that vessel how this man was, he relieved him from duty. He did ask him questions, and Lustgarten's own testimony

and the testimony of this witness who was in the same room was that nothing much was said except, 'I am sick.'

* * * * * * *

"Mr. LANDIS. I renew my motion to dismiss the second cause of action on the ground that this man was given all the medical treatment that was necessary on board that vessel, and was given adequate care and attention.

* * * * * * *

"The COURT. I will deny the motion and allow you an exception."

Second. In denying the defendants' motion to dismiss the second cause of action contained in the complaint made at the close of the entire case as follows:

347 "Mr. LANDIS. If your honor please, I renew my motion to dismiss the second cause of action on the ground that the plaintiff has not succeeded in making out his second cause of action.

"The COURT. I will deny that motion.

"Mr. LANDIS. Exception."

Third. In denying the defendants' motion to dismiss the second cause of action contained in the complaint as against the Consolidated Navigation Company on the grounds that the Consolidated Navigation Company was merely the agent of the owner of the ship at the end of the plaintiff's case as follows:

"Mr. LANDIS. I would like to make a motion that the second cause of action be dismissed as against the second defendant, the Consolidated Navigation Company. Exhibit 4 introduced in this case is the operating agreement which shows upon its face that Consolidated Navigation Company was merely the agent.

* * * * * * *

"The COURT. Motion denied.

"Mr. LANDIS. And I take an exception."

Fourth. In denying the defendants' motion to dismiss the second cause of action contained in the complaint as against the Consolidated Navigation Company at the end of the whole case as follows:

"Mr. LANDIS. If your honor please, I move that the second cause of action be stricken out because it has not been established
348 by the plaintiff that either of the defendants is connected with the steamship on which the plaintiff was employed except as agents.

"The COURT. Motion denied.

"Mr. LANDIS. Exception."

Fifth. In denying the defendants' motion to dismiss the complaint as against the United States Shipping Board Emergency Fleet Corporation at the end of the plaintiff's case as follows:

"Mr. LANDIS. I move for a dismissal of the second cause of action on the ground that the United States of America owns this vessel

as shown by this operating agreement and the United States Shipping Board Emergency Fleet Corporation is merely the agent of the United States in the operation of this vessel.

"The COURT. Motion denied.

"Mr. LANDIS. Exception."

Sixth. In denying the defendants' motion to dismiss the second cause of action contained in the complaint as against the United States Shipping Board Emergency Fleet Corporation at the end of the whole case as follows:

"Mr. LANDIS. If your honor please, I move that the second cause of action be stricken out because it has not been established by the plaintiff that either of the defendants in this action is connected with the steamship on which this plaintiff was employed, except as agents.

"The COURT. Motion denied.

"Mr. LANDIS. Exception."

* * * * * * *

349 Seventh. In denying defendants' motion for a directed verdict as follows:

"Mr. LANDIS. Now, if your honor please, I move that the court direct a verdict for the defendants in this case.

"The COURT. Motion denied.

"Mr. LANDIS. Exception."

Eighth. In refusing the defendants' request to charge as follows:

"Mr. LANDIS. If your honor please, may I ask for one instruction? Will your honor charge that if the jury find that the plaintiff has not pulmonary tuberculosis then they must find a verdict for the defendant.

"The COURT. I refuse to so charge. * * *

"Mr. LANDIS. May I except to your honor's refusal to charge?

"The COURT. You may."

Ninth. In charging the jury concerning plaintiff's right to recover damages for injuries received by reason of the fact that he was made to work as follows:

"The COURT. * * * gentlemen, even if you find that he had not pulmonary tuberculosis, the mere suffering of the man during the time that he was at work, if that was caused by a wrongful order and disregard of the duty imposed upon the ship—that in itself might be the basis for an award of damages to compensate him for that suffering, and for any other suffering that you gentlemen upon all the facts and circumstances in this case find he may have
350 had or damage that he may have incurred as the result of the wrongful order, if you find the wrongful order was given.

Mr. LANDIS. And may I except to that part of your charge which states that the jury has a right to return a verdict for any suffering that the plaintiff might have had as the consequence of doing what he did in those two hours."

Tenth. In denying defendants' motion for a new trial as follows:

Mr. LANDIS. If your honor please, I move that the verdict be set aside as contrary to the law and contrary to the evidence and contrary to the weight of the evidence and on all the other grounds set forth in the appropriate section of the civil practice act except on the grounds that the verdict is insufficient; and on the further grounds that the verdict is excessive.

"The COURT. Motion denied.

"Mr. LANDIS. May I have an exception?

"The COURT. Yes."

Wherefore defendants pray that the said judgment of the District Court for the Southern District of New York may be reversed with costs.

Dated, New York, N. Y., October 5th, 1927.

CHARLES H. TUTTLE,
United States Attorney for the Southern District of New York.
IRVING L. EVANS,
Attorneys for Defendants.

Office & P. O. Address, Room 700—45 Broadway, Borough of Manhattan, city of New York.

352 [Citation in usual form omitted in printing.]

353 In United States District Court

[Title omitted.]

Stipulation on Appeal Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed upon by the parties.

Dated, New York, N. Y., February 11, 1928.

SILAS B. AXTELL,
Attorney for Benjamin Lustgarten.
CHARLES H. TUTTLE,
Attorney for U. S. S. B. E. F. C.
IRVING L. EVANS,
Attorney for Consolidated Navigation Company.

[Clerk's certificate to foregoing transcript of record omitted in printing.]

355 In United States Circuit Court of Appeals for the Second Circuit

No. 14—October term, 1928

Argued October 11, 1928. Decided October 29, 1928

BENJAMIN LUSTGARTEN, AN INFANT, BY HIS GUARDIAN ad litem, John A. Lydecker, defendant in error (plaintiff below)
v.
UNITED STATES SHIPPING BOARD EMERGENCY Fleet Corporation and Consolidated Navigation Company, Inc., plaintiffs in error (defendants below)
} In error to the District Court of the United States for the Southern District of New York

Charles H. Tuttle, U. S. atty., and Edgar G. Wandless, both of New York City (Arthur M. Boal and Frederick R. Conway, both of Washington, D. C., and David B. Landis, of New York City, of counsel), for plaintiffs in error.

Silas B. Axtell, of New York City (Myron Scott, of New York City, of counsel), for defendant in error.

Before MANTON, L. HAND, SWAN, and AUGUSTUS N. HAND, Circuit Judges

Opinion

Per curiam. Judgment affirmed, with costs. See Sloan Shipyards Corp. et al. v. Shipping board Emergency Fleet Corp., 258 U. S. 549, 42 S. Ct. 386, 66 L. Ed. 762; U. S. Shipping Bd. Emergency Fleet Corp. v. Greenwald (C. C. A.) 16 F. (2d) 948.

356 In United States Circuit Court of Appeals, Second Circuit

[Title omitted.]

Order for mandate

Filed November 5, 1928

Error to the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

M. T. M.
A. N. H.

357 [File indorsement omitted.]

358 [Clerk's certificate to foregoing transcript of record omitted in printing.]

359 In Supreme Court of the United States

Order allowing certiorari

Filed March 5, 1929

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Indorsed:] File No. 33,985. U. S. Circuit Court of Appeals, Second Circuit. Term No. 676. United States Shipping Board Merchant Fleet Corporation, sued in the name of the United States Shipping Board Emergency Fleet Corporation and Consolidated Navigation Company, Inc., petitioners, vs. Benjamin Lustgarten, an infant, by his guardian ad litem, John A. Lydecker. Petition for writ of certiorari and exhibits thereto. Filed February 4th, 1929. File No. 33,985.

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